**Law 280 Law of Evidence**

**Nikos Harris Summer 2011**

**Glen Tedham**

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# Introduction

HOW ARE WE GOING TO PROVE OR DISPROVE ANY ELEMENT OF ANY LITIGATION, WHETHER CIVIL OR CRMINAL? This is what most Court cases are actually about. This is all about leading EVIDENCE.

Have the necessary elements been met? Is there an actionable tort? Should spousal support be awarded in a divorce? The only way to know is through evidence – witnesses, scientific evidence, documents, etc, etc, etc.

Cases are made (or destroyed) by the existence, lack of, admissibility, and/or presentation of evidence from which the Judge and/or Jury will be making a finding of fact.

**Criminal** proceedings tend to most clearly and strictly define evidentiary rules. Caution is high where peoples’ liberties are at stake – also where juries are involved to ensure that ***they*** understand the rules.

## Most laws of evidence come from:

* **Common Law** – *good due to flexibility (statutes are hard to amend*) – *bad due to inaccessibility and some unpredictability (i.e. Criminal Code)*
* Federal ***Canada Evidence Act***(R.S., 1985, c. C-5 ) – *only covers* ***some*** *evidentiary rules (Federal – i.e. criminal cases)*
* ***BC Evidence Act*** (*Provincial Matters – such as torts, and other civil proceedings)*
* ***The Charter*** – *actually created some evidentiary rules*
* Often a textbook such as *Wigmore’s Rules of Evidence,* or Paccioco’s *Law of Evidence in Canada* is relied on for theory.

### In general Canadian Courts prefer flexibility – via a principled analysis.

* ***Are the principles upon which the evidentiary rules are based still relevant?***
* ***The more rigid the rule, perhaps the less likely it is that it still reflects the principles behind it.***
* ***Must consider all the factors in context.***
* ***Dangers of this approach is highly unpredictable outcomes in some cases – which in part may lead to the creation of “mega trials” resulting from incredibly prolonged debate over evidentiary rules.***
* ***Also, difficulties preparing for cases and/or advising clients in advance.***

Fair Trials are about… **recreating the past**… which is always difficult, because context comes in and so there is frequently a tension between TRUTH and JUSTICE.

## Admissibility (good vs. bad on the scale of promoting truth and justice)

* Promote **fair trials**. (Balance of Truth and Justice.)
* The rules of admissibility are based on the **balance between the probative value – (search for truth and justice) – (GOOD) and the prejudicial effect – may actually impede the search for truth – such as jumping to conclusions (BAD)** of the evidence.
* The fundamental goal of evidence presentation is the **search for truth**, so the probative/prejudicial balance is usually applied in relation to it, making truth the ultimate value.
* But, often one has to consider **other values** (**justice**):
  + **Integrity of the legal system**
  + **Confidence and integrity vis-à-vis the police**
  + **Efficiency of the legal system – court cases taking way too long (imagine 50 witnesses all on the same matter – somebody is paying for that)**
  + **Charter rights**
  + **Privacy issues (i.e. counselling records, personal privacy)**
  + **Lawyer/ client confidentiality**
  + **Any other privileged social relationship.**

## So, when thinking about EVIDENCE we have to consider…

* **Admissibility**
* **For what Purpose can/will the evidence be used**
* **Weight**
* **Timing**
  + **Pre Trial Hearing** – to determine if evidence is admissible and if so, potentially *how* it may be used. (as a note: a missing/failure instruction by the judge to the jury at the final stages of the case regarding *how* the evidence may be used may blow up a whole case)
  + **During Trial**
* **Adversarial Nature of trials** [***Swain***]

# *R. v. Noel* [2002] SCC – 168 C.C.C. (3d) 193 - *The law of evidence is qualified search for the truth, seeking to maximize truth finding and to minimize injustice. (Defines P/P balance)*

***The law of evidence is qualified search for the truth, seeking to maximize truth finding and to minimize injustice.***

### Probative Value:

Evidence which is sufficiently useful to prove something important in a trial, by being material and relevant. Probative value of proposed evidence must be weighed against prejudice in the minds of jurors toward the opposing party or criminal defendant.

### Prejudicial Effect:

Evidence that is so prejudicial to the defendant that the outcome of the trial will be improperly influenced. The meaning of “prejudicial evidence” goes to whether a jury will be so swayed that it will convict on emotion rather than proof. The judge may hear and see all the evidence, even evidence that may be prejudicial, since she is expected to ignore its prejudicial character.

# *R. v. Swain* [1991] SCC *Evidence in the context of the adversarial system of trial (Insanity evidence/“defence” from Crown)*

**Facts:** Accused was charged with assault and aggravated assault. Over the Accused’s objections, the **Crown sought to adduce evidence with respect to insanity** at the time of the offence. The trial judge allowed the evidence and Accused was found not guilty by reason of insanity.

Accused argued that **Charter rights were violated**.

**Issue:** Right of autonomy of a defendant (and prosecutor) (or opposing counsel in the case of a civil case)

**Discussion:**

• **Adversarial system** – defendant and prosecutor both get to decide what evidence is presented, in which order it is presented, and how it is presented. (Presumably this is a good way to get to the truth, because each side will present its strongest case and then each side can test/cross-examine.)

• **SCC limits** to the autonomy the parties as to leading evidence:

1. **Duty not to mislead** the court: one cannot lead irrelevant evidence for a malicious purpose;
2. **Duty to court** as well as client;
3. Crown duty of **fairness**
4. **Crown** duty and goal is not to get a conviction but to **see that justice is done**.

• **Judge** serves the role of a **gatekeeper**

* + Even though the adversaries have decided to bring in the evidence, judge can overrule this.
  + Judges have a duty to ensure that all of the evidence is relevant.
  + Judges will also get involved in questioning Witnesses, especially expert Ws for clarification.

**Ruling:** Appeal allowed.

## Discovery/Disclosure:

* Discovery/disclosure is one of the primary evidentiary rules.
* **Lack of proper disclosure** has been found to be one of the **most significant sources of wrongful convictions**.
* The **police have to turn over all of their evidence** to the Accused, **erring on the side of giving too much**. This is done to prevent wrongful convictions.
* It is also based on the principle that Accused should be able to review all of the evidence to **construct their defence in whichever way they wish. (full answer and defence)**
* Full disclosure also contributes to **court efficiency**, may promote a higher rate of **guilty pleas or decisions to abandon prosecution/claims**, etc.
* In **civil** trials, **both sides have to make disclosure**.
* In **criminal** trials, **defence sometimes** also **has to make disclosure**.
* ***Occasionally*** – there will be an agreement whereby the **defence counsel will be allowed to look at “non-disclosed” information**, provided there is also an ***undertaking***whereby the defence agrees not to reveal any of the information to anybody – including their client – so that the opposing sides can come to some agreement about whether the evidence is included or not. (**NEVER applies to “privileged” information**.)

## Exceptions to disclosure:

* + It is clearly **irrelevant**
  + **Privileged** evidence
  + **Interference** with an **on-going investigation**
  + **National security**

# *R. v. Taillifer; R. v. Duguay* [2003] SCC *ALL Evidence must be disclosed if there is some reasonable possibility that it may be of some use.*

**Facts:** A 14-year-old girl was killed. ACs were charged and convicted for first degree murder. Accused.T’s appeal from conviction was dismissed. Accused.D was allowed and a new trial was ordered for second degree murder. Accused.D then pleaded guilty to manslaughter. He became aware that the police and Crown had failed to disclose evidence, including contradictory evidence by Ws and evidence supporting their alibis. Accused had been in custody for eight years.

**Issue: What does the Crown have to disclose?**

**Discussion:**

* Section 7 Charter right to make **full answer and defence**. (therefore **disclosure is a Constitutional right**)
* Very **low threshold** – only a **reasonable possibility** .
* Disclosure has to take place in a **timely manner**.
* If something is **completely irrelevant** then it **does not have to be turned over**
* This evidence **does not have to be admissible** - let the defence and the court sort this out. Even the material which is not admissible on its own can be of importance and become admissible in the context of the trial.
* Everything in the **possession** of the State (both police and Crown prosecution) has to be disclosed their material, even if it is not all sent – **including a list of items they are NOT disclosing**.
* Evidence also has to be disclosed in a **timely manner**.

**Ruling:** Appeal allowed

# Proof in Judicial Decision Making

# Probative Value, Prejudicial Effect, and Admissibility

* Ideally, **issues of admissibility are dealt with pre-trial**. This way the jury is not exposed to anything prejudicial.
* In many cases, **presentation of prejudicial evidence to the jury will be grounds to re-trial**.
* So, in pre-trial hearings, the evidence is put to the basic common law test of Probative/Prejudicial value based on **the central factor of the reliable search for the truth**.

# *Re Palma and The Queen* (No. 2) OSCJ – (3 part test for evidence to be received) Relevant; Material; Admissible

* Evidence which is **relevant and material has probative value**.

In order for evidence to be received it must be (all three required):

1. **Relevant**
2. **Material**
3. **Admissible**

# *R. v. Arp* [1998] SCC Material & Relevant evidence either increases or decreases the probability of a fact in issue. \*\*\* evidence of propensity or disposition is an exception to the general rule that all relevant evidence is admissible \*\*\*

* For something to have probative value it must be material and relevant.

1. **Material** means **relating to a fact in issue** at the trial
2. To be **Relevant,** the evidence must **tend to increase or diminish the probability of an existence of a fact** in issue**.**

* Material & Relevant evidence therefore either **increases or decreases the probability of a fact in issue**.
* **Prejudicial** **evidence** is something sufficient to **sway the opinion of the jury based on emotion** and prejudice.
  + - The jury **may convict on the basis of** the Accused **being a generally bad person**
    - The jury **may wish to punish** based on other **previous crimes or misconducts**
    - The jury may be **distracted from the crime in question**, **shifting the focus of the trial towards irrelevant**
    - The jury **may be tempted to apply a lower standard of proof** – such as balance of probabilities – as opposed to BARD.
* There are **degrees of severity to the prejudicial effect**:
  + - The **worse the behaviour, the more likely the effect will be prejudicial**.
    - The **longer the presentation** of the evidence is, the **more** **likely the effect will be prejudicial**.
* **Because of very serious dangers to the accused, evidence of propensity or disposition is an exception to the general rule that all relevant evidence is admissible**.
* In the end, the trial judge has to weight the balance of probative and prejudice.

# *R. v. Seaboyer* [1991] SCC EVIDENCE PRESENTED BY THE DEFENSE: The Prejudice must substantially outweigh the probative value of the evidence before a judge can exclude it. (Womens’ sexual reputation and her credibility)

**Seaboyer Standard: EVIDENCE PRESENTED BY THE DEFENSE:** The Prejudice must **substantially** outweigh the probative value of the evidence before a judge can exclude it.

* Must be extremely cautious in restricting the power of the accused to call evidence.
* An innocent person must not be convicted.

“**If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated in so far as possible**.”

**Facts:** At issue on these appeals was the constitutionality of **ss.276 and 277 of the Code**, the "rape-shield" provisions, which **restricted the right of defence counsel at a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions**. The Accused was charged with sexual assault of a woman with whom he had been drinking in a bar.

**Issue: When does the P/P balance tip in favour of inadmissibility**?

**Discussion:**

* It is made tougher for the judge to exclude evidence that the Accused wants to lead
* Threshold for Crown is if the prejudicial value outweighs the probative value by the smallest amount then the evidence will not be admissible.
* ***Defence* evidence can only be excluded** if its **probative value** is **substantially** outweighed by **prejudice**.
* Something that will merely mislead has to face a lower threshold of inadmissibility for defence.
* The system must guard against wrongful convictions.

**Ruling:** Appeal dismissed.

# *R. v. (F.F.)* *B.* [1993] SCC (1) *Probative Value of otherwise Prejudicial Evidence may be increased if it is pertinent to something that the Prejudiced Side builds into their own case. (2) Prejudicial evidence has to be presented to the jury with limiting instructions. (Uncle… “Why did you wait so long to complain about sex abuse?”)*

**Facts:** Accused was the complainant's uncle and cared for her for several years when she was a child. The complainant alleged that the appellant physically and sexually abused her from the age of six until she was 16. She did not report the incidents sooner because of the Accused’s violent control over her and her family. The trial judge admitted the testimony of the complainant's siblings regarding the Accused’s violent control over the complainant's family. Accused argued that this evidence was inadmissible because it was oath-helping evidence and its prejudicial value outweighed its probative value.

**Issue:** Is the evidence of Accused’s domineering behaviour admissible?

**Discussion:**

* **All relevant evidence is admissible unless barred**.
* Evidence which tends to show **bad character or criminal disposition is admissible only if**:
  + It is **relevant to some other issue** beyond disposition or character
  + The **probative value outweighs the prejudicial effect**.
* So…IN THIS CASE… **Defence asks why complainants waited so long to raise the complaint – the response then opens up the issues of dominance – which then makes the evidence is highly pertinent**.
* When theprejudicial effect of the evidence outweighs the probative value, but **it is still found admissible, the evidence has to be presented to the jury with proper instructions, as to how to use it and how not to use it**.
* The judge must warn the jury about the prejudicial effect and tell them why the evidence is being admitted. He has to tell jury:

• Why the evidence is presented

• How it must not be used for prejudicial reasons

**Ruling:** The evidence is admissible, but the judge failed to properly charge the jury

# Types of Evidence

**Direct and Circumstantial**

## Direct Evidence: (no inference)

Evidence, which if believed, proves the existence of the fact in issue without inference or

presumption. **No further inference needs to be drawn from it**. **The classic example is eyewitness evidence**. (***Dhillon***)

## Indirect or Circumstantial Evidence: (requires inference)

Evidence from which one **needs to draw an *inference* in order to use it**. It is not intrinsically bad, or weak, but the fundamental difference between direct and circumstantial evidence are the possibilities of error that arise from the two.(***Dhillon***)

## There are two ways that direct evidence can be faulty:

1. The eyewitness is ***lying*** (credibility)
2. The eyewitness is ***not*** ***lying, but is mistaken***. (reliability)

## Circumstantial evidence can be faulty in three ways:

1. The eyewitness is ***lying*** (credibility)
2. The eyewitness is ***not lying, but is mistaken*** (reliability)
3. The ***inference is wrong***:

* There **can be multiple interpretations** and inferences made from any circumstance
* Once we accept the evidence, we **have to ask if there is another reasonable inference that can be drawn**

**Hodge’s Rule:** Cannot convict unless it is convinced BARD that the proven facts lead the court to no other reasonable conclusion than the guilt of the Accused. However, this rule is not inexorable.

## Real Evidence: (tangible evidence)

Actual tangible evidence which can be seen, heard, touched, etc. This includes things like:

* A weapon
* Any actual/physical object
* An audio recording
* A photograph
* A videotape

# *R. v. Dhillon* [2001] BCCA *Before basing a guilty verdict on circumstantial evidence, one must be satisfied BARD that the guilt of the Accused is the only reasonable inference to be drawn from the facts.*

**Facts:** Accused contends that the charge to the jury on circumstantial evidence was defective because (1) the judge did not tell the jury that there was no direct evidence and (2) the judge instructed the jury that in a circumstantial

evidence any reasonable doubt must be based on proven fact.

**Issue:** Are these sufficient for a re-trial?

**Discussion:**

* The accused is presumed to be not guilty and the **onus of proof is upon the Crown**.
* Reiterates the standard instruction on convicting and BARD from ***R. v. W.(D)***[1991] SCC
* Error in the ***Robert*** case (backfired lawnmower) – **just because the judge/jury does not *believe* the evidence does not mean that it fails to raise a reasonable doubt. That would reverse the burden of proof**.
* Before basing **a guilty verdict on circumstantial evidence**, **one must be satisfied BARD** that the guilt of the Accused is **the** ***only*** **reasonable inference** to be drawn from the facts (***Hodge’s Rule***)
* Inference is a much **stronger kind of belief than conjecture or speculation**.
* There is **no need for the judge to tell the jury that there was no direct evidence** - this is stating the obvious.
* Neither was there any problem with the charge.

**Ruling:** Appeal denied.

# *R. v. Robert* [2000] ONCA *Accused’s evidence does not have to be believed or accepted, as long as it is sufficient to raise a Reasonable Doubt (Careful not to reverse burden of proof – lawnmower fire)*

**Facts:** Accused is **convicted of arson based on purely circumstantial evidence**. He claims that it was an accident. The judge held that to convict it was sufficient that the facts lead to no other reasonable conclusion that the guilt. Accused argues that instead of applying this principle to the Crown case, the judge applied it to Accused’s explanation of the fire.

This **required him to prove a reasonable explanation for the fire** on the facts, and **created a reverse onus**.

**Issue:** Did the judge create a reverse onus?

**Discussion:**

* Here, instead of asking if Crown has proven guilt BARD, the trial judge found guilt using the Hodge formula to test the explanation of the Accused. Thus, he forced the Accused to offer an explanation based on “proven facts”
* “**The Miller Error**”: A common instruction to the jury was to consider evidence which it accepted or believed, and to reject and not consider that which it did not. (This is inherently problematic.)
* The problem with this is that **Accused is entitled to be acquitted on evidence that is not believed or accepted**, if it raises a reasonable doubt.
* The **Miller Error gives the impression that you can only acquit on evidence you accept or believe**; it is an error of law as it requires Accused to prove something, creating a reverse onus, whereas **Accused does not have to prove anything, just raise a Reasonable Doubt**.
* **The use of the phrase “proven facts” is problematic, particularly from the perspective of the accused.**
* **There is no obligation on an accused to prove any facts**.

**Ruling:** Appeal allowed

## The Miller Error: A common instruction to the jury was to consider evidence which it accepted or believed, and to reject and not consider that which it did not. (Wrong!)

The Miller Error gives the impression that you can only acquit on evidence you accept or believe; it is an error of law as it requires Accused to prove something, creating a reverse onus, whereas Accused does not have to prove anything, just raise a RD (***R. v. Miller***[1991] ONCA)

# *R. v. Baltrusaitis* [2002] ONCA *Even if the evidence is not believable, if it raises a reasonable doubt, Accused must be acquitted.*

**Facts: Judge made the charge that “your acceptance of evidence as truthful transforms evidence into fact, upon which you base your verdict”. Accused appeals that this is the Miller Error.**

**Issue: Is this so?**

**Discussion:**

* **Damn right it is.**

**Ruling:** Word

# Real and Demonstrative Evidence

**Real (physical) Evidence:** Material evidence of objects actually involved in the case that can be presented in the

courtroom in original form.

**Demonstrative Evidence:** Evidence that is the representation of the object. This includes photos, recordings,

videos, charts, diagrams, etc.

## Videos and Photos

* Real or demonstrative evidence is **generally helpfully and very probative** (***R. v. Nikolovski***[1996] SCC)
* Can be **powerful** because evidence **seems neutral**
* **Danger** with video or photos is that they **can be highly inflammatory** as it may be so **graphic** to make the jury act in an inappropriate way. So, there is an **inherent prejudicial impact**, thus one must have a legitimate reason why they are putting this information before the jury
* One **needs to show that it demonstrates something that something less graphic could not** show (***R. v. Kinkead***)
* After ***Nikolovski*****videotapes are admissible** as evidence, as a natural progression from audio and photos. The factors which are considered in assessing the admissibility of videotapes are generally said to be the same as those for photographs.
* Per ***R. v. Creemer***[1968] SCC, the **admissibility of photos (and videos) depends on**:
  + Their **accuracy** in representing the fact
  + Their **fairness** and absence of intention to mislead
  + Their **verification** on oath by a person capable to do so.

# *R. v. Penney* [2002] NFCA *Videotape evidence must be untampered, with no intention to mislead, and be an accurate representation of the facts. (Seal Hunt) \*\*\*edited video may still be okay for ID purposes\*\*\**

**Facts:** Accused is a seal-hunter, charged with killing a seal in a slow and brutal manner based on a video made by a animal-rights group, which “may have been” edited.

**Issue:** Is a **videotape admissible** as evidence? Is **selective taping** (recording only partial events based on the

cameraman’s bias) **an issue**?

**Discussion:**

* In deciding if the video is admissible, **the Crown must consider whether the video was changed or altered**. **Failure to undertake this determination makes videotapes inadmissible**. (***Nikolovski***)
* This decision relies on the assessment of credibility of the Witnesses introducing the video
* The **Witnesses are not credible, and the video seems to be altered**, as it was transferred through multiple formats.
* It is also filmed in a most biased manner, **focusing on the gory detail**, with **large parts of the event missing**.
* The video **may not be** an **accurate** representation of the facts.
* The **purpose** of this video as evidence was **not** to establish the Accused’s **IDENTITY** (was on the scene of the crime), but that Accused clubbed the seal in a graphic manner. In the first case it would have been admissible, but in the latter case it is prejudicial.
* **“where a video is being used for the purpose of identification, a continuous video may not be necessary”**

**Ruling:** Appeal allowed and acquittal restored

### Admitting Video Evidence:

1. **Authenticate**: explain the basic process by which the evidence came into existence

* Call the person who made the video or photo and have them testify as to how it came into existence
* Call a Witness who was at the scene of events and who is willing to testify that it is an accurate description of what happened.
* Call a technician who set up the camera and/or who can testify as to the process of the camera.

1. **Establish** a basic level of **fairness**: **demonstrate that the video does not present a misleading image**

* Start with the basic Probative/Prejudicial test (is the video fundamentally misleading?)
* For what purpose is the evidence being led? Counsel should set this out for the judge;
* Show that it accurately represents what happened
* Potential problems:
* Intermittent / gaps in recording;
* Selective editing to achieve a goal;
* Format changing;
* Can weight issue if the problems are not too bad or an admissibility issue if lots of potential problems
* Could argue compounding error (as in ***Penney***) where all the factors added up in weight.

# *R. v. Kinkead* [1999] ONCA *Whether crime scene photos are too graphic to be used without causing prejudice is best decided on individual basis. (inflammatory photographic evidence can create prejudice)*

**Facts:** Accused is charged with two counts of first degree murder. Crown wants to introduce photos from the crime scene, which Accused argues to be too graphic and gory, thus leading to prejudice.

**Issue:** Is the prejudicial effect of the photos strong enough to merit exclusion?

**Discussion:**

* ONCA sets out the basic Probative/Prejudice test.
* The **photos** pass the P/P test as they **are material and relevant**.
* **The real question is if the photos are so inflammatory and graphic to cause loathing and hatred towards Accused**
* Our **culture is so desensitized** to such images, that they are **not likely to sway the jury** from their sworn task
* Crown wants to bring in photo portraits of the girls when they were alive to show that they wore specific necklaces.
* Defence avoids showing these pictures by agreeing that the necklaces were worn by them.

• The judge rules the following:

* **Blood and blood smears** are **OK**
* **Autopsy is excluded**, except for where they show bruising to the face.
* **Bodies in situ** (crime scene) is **OK**
* **Pictures of wounds** - these are to be **judged on an individual basis**, but anything too grotesque is best left out
* **Police video** footage is to be **edited to exclude some of the graphic blood**, etc.

**Ruling:** Some items are admitted, some aren’t.

# Documents: It is possible to attach documents as admission if there is no debate among counsel, but if there is disagreement, then the documents have to be authenticated.

**Authentication: *the onus is on the person leading the evidence***

1. Have the person who **authored the document** testify.
2. Have **someone who was present** (e.g. board meeting) but didn’t author the document **vouch that the document is an accurate representation**
3. Show that it was **found it in possession of someone, such as Accused or Witness**. This can be helpful depending on the purpose of bringing in the evidence.

# *Lowe v. Jenkinson* [1995] BCSC *Documents must be authenticated*

**Facts:** PL is a solicitor, presenting a transcript of an alleged phone conversation between D and his insurance agent.

**Issue:** Can this transcript be authenticated?

**Discussion:**

* This is **not an original conversation**, and there is **no way to verify** the validity of this, or even whose voices are on the tape, without proper authentication.
* **Documents must be authenticated as outlined above**.
* PL fails to do so.

**Ruling:** The **transcript is not admissible**.

# Judicial Notice – when evidence is not actually required

# *Olson v. Olson* [2003] ABCA *Judge may take judicial notice of a fact that is so obvious as to make it unnecessary to call evidence on that point. (Athletic training ≠ future career)*

**Facts:** The case concerns whether a 19 year old athlete falls within the definition of a “child” to a marriage under s.

2 of the Divorce Act, for the purposes of getting increased alimony payments. One side wants to rely on judicial notice that **enrolling a child in athletic programs leads to improved career options**.

**Issue:** Can the **judge take judicial notice of this**?

**Discussion:**

* Sometimes **something will be so notoriously known that the judge will take it for granted without hearing evidence on it** - hence, the concept of judicial notice.
* The **test for judicial notice is strict**: **a court may properly take judicial notice of facts that are either so notorious or generally accepted as not to be the subject of debate** among reasonable persons.
* The rule of precedent is applicable here **- previous finding of judicial notice can be relied on in subsequent cases**.
* In this case… “**no evidence…that special training would… fit him for an occupation in later years**”
* “**chambers judge erred in law in concluding that she did not require evidence that his sports activity would advance [child’s] career”**
* **“[child’s] specific evidence was that he wished to be a law enforcement officer… if anything his evidence… suggested that university education was required to achieve his goal of becoming a law enforcement officer.”**

**Ruling: (**Athletic training ≠ future career) No judicial notice.

# Extrinsic Misconduct Evidence

## Character Evidence: Any proof presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour.

## Extrinsic Misconduct Evidence: Misconduct of the Accused or a party that is outside of the subject matter of the proceeding.

* Extrinsic bad character evidence is **presumptively inadmissible** (***Handy***).
* **Onus is on the Crown** to prove **on BoP** that in the circumstances of the particular case the **probative value outweighs the prejudicial effect** (***Handy***).
* **Evidence that does no more than to prove that Accused is the kind of person** to have committed the crime **is inadmissible**, for it will invariable have greater potential prejudicial effect than probative value (***Arp***)

### Prejudicial Nature of the Bad Character of Accused

* Bad Character of the Accused evidence **can lead to serious miscarriages of justice**, especially since the **ability of juries to follow limiting instructions is questionable**.
* Some ways that extrinsic misconduct evidence may be **prejudicial**:
  + **Propensity reasoning**: if **Accused did this before, he is likely to have done it again**.
  + **Punishing for previous bad act**: **Accused deserves to go to jail merely because of his past crimes**.
  + **Distraction**: **too much evidence to consider**.
  + **May lower standard of proof**: **interferes with purity of BARD**.
  + The **risk of prejudice may be higher if** the similar fact acts are **morally repugnant**
* **In a trial with judge alone** rather than a jury trial, it will be **more difficult to have similar fact evidence excluded** because **it is assumed that judges can overcome prejudice.**

## Bad Character of the Accused Admissibility Test:

1. Is it ***relevant* to a material issue** beyond general bad character? (Credibility?)
2. Does the ***probative value outweigh the prejudicial effect***? (See ***Handy***Test for similar fact evidence)

**If yes to both then the evidence is admitted, but judge still needs to warn** the jury of about what the evidence can and cannot be used for.

# *R. v. Cuadra* [1998] BCCA *Courts may admit bad character evidence if it is relevant to something else besides merely bad character of the Accused. (Witness initially gave false evidence because he was scared of accused – based on previous acts of accused)*

**Facts:** Victim claimed that he was confronted by two men, one carrying a bat. Victim identified the Accused as the man carrying the bat. Victim was later stabbed. W testified seeing Accused with a knife. The trial judge admitted evidence of a prior violent act by Accused. Accused testified that a friend was involved in a fight with the victim. He claimed he used the bat to scare away the victim and that it was his friend stabbed him. After conviction, Accused appeals, arguing that the trial judge erred in allowing the Crown to adduce evidence of his character in an effort to rehabilitate a witness who gave a previous inconsistent statement at the preliminary inquiry.

**Issue:** Can bad character evidence be used in this case?

**Discussion:**

* As a general rule, **if evidence that shows bad character is relevant to something else besides merely bad character, and has heavy probative value, then it can be admitted**.
* The **court allows some bad character evidence, because it is material, and is fairly probative**.
  + “…**a witness who is impeached in cross-examination by a prior inconsistent statement is entitled to explain the inconsistency**…” (confirmed here, originally from ***R. v. Speid (1985)*)**
* In the case at bar…
  + The prejudicial effect of admitting the evidence is that this goes against the rule of not admitting bad character evidence.
  + But **it has probative value**. The evidence related to a prior violent act by Accused.
  + It was used to explain why a **Witness was afraid of Accused and might give a prior inconsistent statement (“I didn’t see anything”) to police as to Accused’s involvement in the assault**.
  + Proper instruction was given to the jury.
  + So the **judge did not err** in allowing it.

**Ruling:** Appeal dismissed.

## Similar Fact Evidence – accused has done almost identical acts before.

**Similar Fact Evidence:**

Establishes the conditions under which factual **evidence** **of past misconduct of Accused can be admitted** at trial **for the purpose of inferring that the Accused committed the misconduct at issue**. Similar fact test is engaged in every case where the Crown is presenting evidence to establish the guilt of the Accused that either directly or indirectly reveals the discreditable or stigmatizing character of Accused.

# *R. v. Handy* [2000] SCC *Creates the test for the admissibility of similar fact evidence*

**Facts:** The victim went out drinking with her friends and met Accused whom she had known for several months. They went home together and what began as consensual sex became violent. Accused was charged with sexual assault causing bodily harm. The Crown tried to introduce evidence of Accused’s history with his ex-wife which involved seven past sexual assaults on her. The trial judge allowed it.

**Issue:** Is **Accused’s history of violence with his ex-wife is admissible** as evidence?

**Discussion:**

* Extrinsic evidence of misconduct is **usually inadmissible**, but an **exception can made** because of a **high level of similarity** between the two or more **specific acts**.
* Often a ruling to admit similar fact evidence **can make or break** your case because **once a jury sees evidence of a pattern of conduct they are much more likely to convict**.
* Similar fact evidence is **admissible if** it shows a distinct and **particular propensity to act in a specific way under specific circumstances**, as opposed to a general propensity to do bad things.
* Similar fact evidence **does not need to go to some other point** in order to be admitted.
* Strength of reliability of the similar fact evidence depends on the amount of time it would take to adduce the similar fact evidence: if it would take an inordinate amount of time, the prejudicial side goes way up
* Once similar fact evidence is admitted, **must be accompanied by limiting instructions**
* All of the counts do not need to be charged on, merely serving as background to the charged offence in question.
* **If** the charges are tried separately, and **Accused is acquitted** on one, **it cannot be brought** in **as similar fact for others**.
* **There was strong possibility that ex-wife and complainant colluded.**
* Using this test SCC found that the evidence put forward by the Crown was inadmissible.

**Ruling:** The evidence **is inadmissible because it was not SPECIFIC enough**.

# Admissibility of Similar Fact Evidence Test: (*R. v. Handy*)

1. Examine the **strength of the evidence** in showing that the past events actually occurred. The **credibility of the Witness must be considered** and if there is any motive to lie must have an effect.
2. Consider whether there was any **potential of collusion** between the Witness and the claimant.
   1. If there was merely an **opportunity to collude** then this **is a matter of weight**
   2. If there is an **air of reality to the accusation**, then the **onus is on the Crown to show on BoP that no collusion occurred**, **otherwise the evidence is inadmissible**.
3. Consider the scope of the issue in question. If it is a very **broad issue**, then the threshold **required** **for probative value will be very high**. If it concerns a **material issue** in the trial, then it should be **looked upon favourably**.
4. **Consider whether the evidence supports the inference that the Crown is attempting to draw**. This involves examining the similarities and the connectedness between the events. Factors include:
   1. **Proximity in time** of the similar acts
   2. The extent to which the other acts are **similar in detail**
   3. **Number of** occurrences of the **similar acts**
   4. **Circumstances** **surrounding** or relating to the similar acts (who/what was targeted, what circumstances happened before, during, & after)
   5. Any **distinctive features** unifying the incidents
   6. **Intervening events**
   7. Any **other factors** which would **tend to support or rebut** the underlying unity of the similar acts.
5. Consider the **extent to which the matters** proven by evidence **are material to the issue** at proceedings.
6. Consider the **prejudicial effect** of the evidence, both in **moral and reasoning prejudice**
   1. The **moral prejudice** includes evidence that will cause the jury to think that **Accused is a bad person**. This is particularly where the past events were acts that were more reprehensible than the current facts.
   2. The **reasoning prejudice** includes evidence that presents a **risk of distraction** and will **consume too much time**. (Almost have to have trials for each individual similar fact portion.)

**A particular danger of putting in similar fact evidence**:

* A criminal justice system that has suffered serious wrongful convictions should not take lightly the potential harmful effects of the evidence.
* So one has to consider if there is a strong link between wrongful convictions and similar fact evidence.

## Similar Fact Evidence and Identity

* Sometimes the **way that two or more crimes are committed, supports the conclusion that they were each committed by the same person**.
* Where the Accused can be linked to one of those crimes, the similarity between the crimes might demonstrate that he committed them all.
* Little bits of evidence, which on their own, will not be enough to connect the Accused to the crime scene
* But when brought in as similar fact evidence, they draw a consistent picture.
* Although identity cases are resolved using the general similar fact evidence rule described above, the question of when similar fact evidence will be probative enough to help establish the identity of the perpetrator prompted the SCC in ***R. v. Arp***to provide extremely formalized suggestions for analyzing such case

### Similar Fact Evidence of Identity Test:

1. Is there such **a high degree of similarity between the two acts, that it is objectively improbable that crimes where committed by more than one person**?
2. Is there **some evidence linking Accused to the similar act**?
3. If the picture is such that it is objectively **improbable that the crimes were committed by more than one person, then the evidence is admitted**.

### Character Evidence Called by Accused against a Co-Accused

Subject to the discretion of the trial judge to exclude evidence where its prejudicial effect is greater than its probative value, **Accused person may establish that, by reason of his character, a co-Accused is the more likely perpetrator of the crime with which they are charged. In doing so, however, Accused will be taken to have put his own character in issue.**

* The sole fixed limitation is that **Accused cannot try to establish the propensity of a co-Accused by relying on acts for which the co-Accused has been acquitted**.

# Post Offence Conduct

**Post Offence Conduct:** Conduct by the Accused similar to that, which would be expected of a guilty person. It can be characterized in two broad categories:

1. **Attempts to flee, conceal or destroy evidence, and evade arrest**.
2. **Attempts to avoid successful prosecution: interaction with Witnesses, tampering with evidence**.

Post Offence Conduct is **most commonly** **used in issues of identity, not in levels of culpability**, though it is applicable to considerations of defences.

# *R. v. White* [1997] SCC *Post Offence Conduct is just circumstantial evidence and does not require any special rules, except for a proper charge to the jury. (Accused robbed bank and dumped gun after murder charge.)*

**Facts: Accused is charged with murder** of his acquaintance. **After** his death, **Accused** (who was on probation) **robbed a bank, fled jurisdiction, tried to dispose of a weapon (which matched the murder one), and tried to flee a police chase**. Defence claims that **post-offence conduct has no probative value, and that it was all in relation to the robbery, and not murder**.

**Issue: Is post offence conduct relevant**? - **YES**

**Discussion:**

* Under certain circumstances, post offence conduct can be **circumstantial evidence**.
  + **“…POC is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role.”**
* Examples of this are **flight from jurisdiction, concealment, change of name, etc. This is called “consciousness of guilt evidence**”
* But when this is **introduced to support an inference of guilt, *it is susceptible to jury error***.
  + “**…the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act.”**
* **SCC changes the term “consciousness of guilt” label to the more neutral “post offence conduct”** (POC), which is indicative of the fact that **multiple inferences can be drawn** from the evidence.
* In this case, the POC is potentially relevant to the commission of murder, thus the judge did not have to instruct the jury that there is “no probative value” to Accused’s actions.
* **POC admission or exclusion (probative value) will depend on the facts of the case. The question to be asked is:** “…**what does the Crown seed to prove by means of the evidence?**”
  + “… a ‘no probative value’ instruction… is most like to be warranted where, as in ***Arcangioli*** itself, the accused has admitted to committing the *actus reus* of a criminal act but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts.”
* **Consideration of potential alternate explanations are to be left to the jury**.
* Accused claims that the judge should have charged the jury that unless they are satisfied BARD that the flight and concealment were in relation to the murder, and not to another offence, then they cannot use that evidence to convict. This is wrong.
* **BARD** standard applies to **evidence as a whole**, and **not to individual categories or pieces of evidence**.(***R. v. Morin***)
* **As long as the judge instructs the jury that POC can have other explanations** than the guilt for the offence, **it can be used**.
* **Multiple possible inferences does not negate the probative value of POC**. **This is an issue for the jury to decide. (*Arcongioli*)**

**Ruling:** Appeal dismissed.

# *R. v. Peavoy* [1997] ONCA *POC is to be used for identity, and not the level of culpability. If Accused admits having done actus reus, but pleads a defence, then POC can be used to infer mens rea. (“Yous white men stoled all our land.” “Yous burned our wagons.”)*

**Facts:** Accused is charged with **murder of his buddy, who he stabbed in a fight after a drunken argument over Cowboys and Indians.** Accused claims self defence and intoxication. **After the fight, the accused called his lawyer and his girlfriend.**  When police arrived to his apartment and made loudspeaker demands that he exit, he claims to have slept through it (because of a hearing problem), finally exiting his apartment 3 hours later. Accused admits that he stabbed the victim, but claims intoxication and self-defence. Crown argues first degree murder based on his POC.

**Issue: Can POC be used to show the degree of culpability? - NO**

**Discussion:**

* **Evidence of POC can be used to determine conduct of a guilty person versus an innocent one**. (Why would an “innocent” person – **self defence** – cover up what happened?)
* However, **POC *cannot* be used to establish *degree* of culpability** (**manslaughter/second/first degree murder**)
* ***Can* be used if Accused has admitted the elements of the offence and is arguing they are not culpable based on a defence**. (**i.e. – intoxication… if they were so drunk why did they clean up?**) Then POC can be introduced because it is not dealing with “how culpable”, but “culpable or not culpable” (as in **whether there was a sufficient mens rea** to show criminal culpability)
* It **can be used as evidence against the defence of self-defence**.
* **POC** **can also be admissible** for determining mens rea, such as **purposeful acts** after an offence **that rebut intoxication defence, as it shows a functioning state of mind**.
* In the case at bar, Accused admits actus reus, but denies mens rea (culpability) based on defences of intoxication and self-defence.

**Ruling: Very messy… New trial** ordered.

# *R. v. S.C.B.* [1997] SCC *Where one can reasonably infer from POC that Accused is not guilty, then the evidence has probative value and should be admitted unless there is a substantial degree of prejudicial effect.*

**Facts:** Accused is charged with sexual assault with a weapon. The victim (Accused’s second cousin) while riding on an isolated trail, was knocked off her bike with a stick by a man on a motorcycle, hit with sticks and sexually assaulted. This is a question of identity: the victim recognizes the Accused as the perpetrator, and Accused’s friend testifies that Accused was with him until just prior to the time of the offence, when he rode off alone on his motorcycle. Accused denies this, and there are issues with testimony and facts, as well as expert evidence by a doctor that Accused is not the kind of a man to do these things, and the fact that **Accused fully cooperated with the police, gave *DNA*, *blood*, and *hair*, evidence, and took a (*lie detector test*) – (*ldt not usually admissible)***. Accused was acquitted.

**Issue: Can POC such as DNA test and lie detector test be led to show “consciousness of *innocence*”?**

**Discussion:**

* Crown submits that judge erred in admitting the evidence that Accused took a lie detector test to bolster his credibility and show “**consciousness of innocence**”. Can such evidence be led?
* Evidence that Accused agreed to take a polygraph test only has probative value as it helps infer that Accused was willing to do something that a guilty person would not do. (However, polygraph evidence itself is inadmissible).
* Also, **Accused could have hoped to fool the polygraph. So, multiple inferences can be made from such evidence.**
* **POC supporting an inference favourable to Accused should be admitted, if the P/P balance makes it admissible**.
* **SCC says we have to go back to basic principles of *Seaboyer* - the lower standard of P/P balance for Accused**
* Like “consciousness of guilt” evidence, **“consciousness of innocence” evidence with multiple reasonable inferences should be left to the trier of fact**.
* **However… no inference of guilt can come from an accused standing strong on their Charter rights to not cooperate**.

**Ruling: Evidence is admissible**, but trial reordered on a different matter.

## Reversible error

n. **a legal mistake** at the trial court level which is **so significant** (resulted in an improper judgment) that the **judgment must be reversed by the appellate court**. A reversible error is distinguished from an error which is minor or did not contribute to the judgment at the trial

# Bad Character of the Witness

On a cross examination you can attempt to undermine Witnesses by challenging their:

1. **Reliability**
   1. Associated **not with honesty or trustworthiness but the *accuracy*** of W’s evidence due to certain objective circumstances. Was it dark? Was it far? Was Witness scared? Did Witness wear glasses? How much did Witness actually see? Are they simply mistaken?
2. **Credibility**
   1. Questioning the trustworthiness of the W: he may be **lying**, **exaggerating**, **minimizing**, etc.
   2. Common areas which give rise to an issue of credibility:
      1. **Inconsistent statements**;
      2. **Interested in the result** of the proceedings (financial interest, association or relation to the Accused);
      3. **Other motivation**; (bias,
      4. **Questionable logic** in their story;
   3. **Demeanor** on the stand; (however can be somewhat dangerous to put too much weight on this)
   4. **Prior bad conduct of Witness**, such as dishonesty-related prior criminal offences (fraud, obstruction), can raise an issue of credibility.

May be a factor to consider how much weight or emphasis should be put on that W’s evidence.

## Prior Convictions - *Canada Evidence Act s.12 Examination as to previous convictions*

*(1)* ***A witness may be questioned as to whether the witness has been convicted of any offence****, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.*

*(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.*

*(2) A conviction may be proved by producing*

* + 1. *a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and*
    2. *proof of identity.*

# *R. v. Corbett* [1988] SCC *S.12 of CEA applies to cases when Accused is the Witness, but only to establish the credibility of their testimony – not to propensity to commit crimes.*

**Facts:** Accused is charged with first degree murder and sentenced to life. At trial he is called as Witness, and under s.12, evidence is brought of his past conviction of murder. Accused appeals, claiming that this violates his s.11(d) right to a fair hearing, by reason of introduction of evidence of his earlier conviction.

**Issue: How does s.12 work when the Accused is the W?**

**Discussion:**

* **S.12 applies** to cases where Accused is the W, **but only insofar as it determines the trustworthiness of their testimony**, and **not for the finding of guilt**.
* When the Accused is the W, **merely the fact of the conviction must be brought, and not the details** of it (unless a similar fact application is made)
* So, the **prior convictions are simply evidence for the jury to consider**, along with everything else, in assessing **the *credibility*** of the Accused.
* **The judge has discretion to control the amount of past convictions evidence brought in**.
* **The trial judge may exercise his discretion to exclude evidence of prior convictions** in those unusual cases where a mechanical application of s.12 would undermine the right to a fair trial, that is **when the prejudicial effect outweighs the probative value.**

### Corbett Application to bring evidence of prior convictions of the Accused:

* 1. **Timing** – the more recent it is the more probative it is
  2. **Crime of Dishonesty**(?) – the more dishonest the crime, the more probative it is. (fraud, perjury, theft, etc. versus assault, pot possession, etc.)
  3. **Similar Facts –** counter-intuitively, the more similar it is – the more likely it will be **prejudicial** – and thus **inadmissible**. (because this is about *credibility* not *propensity*)
* Because of the prohibition of general bad character evidence, s.12 has been interpreted as requiring some other permissible reason for bringing in the evidence: prior record must go to a relevant issue.
* The burden of proof remains upon the Crown and the introduction of prior convictions creates no presumption of guilt nor does it create a presumption that the Accused should not be believed.

**Ruling:** Appeal dismissed.

## Other Bad Conduct

* Past acquittals of the Accused are always inadmissible.
* But for other Ws, especially Crown Ws, there is a possibility of introducing evidence of their past general discreditable acts, even if they were not convicted on them.

# *R. v. Cullen* [1989] ONCA *For the purposes of challenging a W’s credibility,(where they are not the accused) cross examination is permissible to demonstrate that the W has been involved in discreditable conduct.*

**Facts:** Accused is charged with driving his truck at the victim. The victim has been previously charged with possession of burglar’s tools, found guilty, but was not given a criminal conviction, only a conditional discharge. At present trial, she was called as a W, and her credibility challenged by leading evidence of her finding of guilt as per s.12.

**Issue: Is this relevant to the proceedings, as she was not convicted, merely found guilty?**

**Discussion:**

* For the purposes of challenging a W’ credibility, **cross examination is permissible to demonstrate that the W has been involved in discreditable conduct that is not limited to criminal convictions**.
* This case turned entirely on the credibility of the victim.

**Ruling:** Appeal allowed, new trial ordered.

# *R. v. Titus* [1983] SCC *Cross examination of a Crown Witness concerning an outstanding indictment is admissible for the purpose of showing his possible motivation to seek favour with the Crown.*

**Facts:** Accused is convicted of second degree murder. He appeals on the grounds that judge refused defence counsel’s request to cross-examine a Crown W about an outstanding indictment of murder that the W has from the same police department.

**Issue: Can an outstanding indictment of the Witness, that has not come to trial, be brought as evidence**?

**Discussion:**

* The purpose of cross-examination is so that the defence may explore all factors which might expose the frailty of the evidence called by the Crown.
* It is fundamental principle of justice that the Witness indicted of murder is innocent until proven guilty.
* But a Witness with an outstanding indictment may have a motive for seeking favour with the Crown.
* In such case, defence counsel has a right to cross examine him.

**Ruling:** Appeal allowed, new trial ordered.

# The Vetrovec Witness

**Vetrovec Witness:** A Crown W that has inherent**, profound or serious reliability or credibility concerns that go beyond regular problems**; These types of Ws have been linked to wrongful convictions. Some recognized categories are:

* **jailhouse informant**;
* W that **has lied under oath during this or another proceeding**;
* W who has given **multiple inconsistent statements**;
* W who is an **accomplice and is now getting a deal**;
* W getting a **benefit for testifying (money; jailhouse privileges (soap on a rope); plea bargain**)

**OPTIONS**:

1. Exclude their evidence.
2. Admit the evidence. Rely on cross-examination and trier of fact to asses credibility.
3. **Allow the evidence, but subject it to some special rules and instruction from the Judge. (this is what the Courts do)**

## Vetrovec Categorization Test: (*R. v. Sauve* [2002] SCC)

1. What is the **degree of problems** with their inherent trustworthiness? Some factors to consider are:
   1. Have they been **involved in criminal activity**?
   2. Do they have an **unexplained delay in coming forward with evidence**?
   3. Did they **lie to authorities**?
   4. Has W sought a **benefit for testimony**?
   5. Has there been evidence that W **selectively disclosed his evidence**?
   6. Has there been a **series of inconsistent statements**?

In some instances, the presence of only one circumstance, such as where W was provided a substantial benefit in relation to his testimony, may be sufficient. In others, the combination of a number of circumstances, such as W’s criminal background and the existence of a number of prior inconsistent statements, may cumulatively require a caution.

1. The threshold **will be dependent on how important the W is to the Crown’s case**?
   1. **The more important the W** is to the Crown case, **the less problems** it would take **to invoke the caution**;
   2. **Where the W is less important** – it would take **much more credibility problems to invoke the Vetrovec caution**

Vetrovec evidence has been involved in famous wrongful conviction cases such as ***Morin***and ***Sophonov****.*

Vetrovec **mandatory special instructions from the judge** (***R. v. Sauve***):

1. Judge must **separate out the Ws from the other evidence and caution that testimony requires special scrutiny**;
2. Judge must **identify the characteristics** of the W **which bring the credibility into serious question**;
3. Judge must caution the jury that **although they are entitled to rely on the W’s unconfirmed evidence** alone, **it is dangerous to do so**;
4. Judge must caution the jury to **look for other independent evidence (corroborating evidence)** that tends to confirm other material testimony of the Vetrovec W

### What is Corroborating Evidence?

* Main approach: look at the corroborating evidence to **decide if it restores your faith in the Vetrovec’s evidence** – this leads back to a balance: the more serious the doubt in the Vetrovec, the more confirmatory evidence will be needed to restore faith.
* **Must be independent of the Vetrovec evidence** and **cannot confirm mere peripheral parts** of the evidence. Mere marginal support for the W’s evidence is not sufficient (***Dhillon***)
* **However** corroborating evidence **does not have to confirm all aspects** of the evidence, rather it is okay if it goes only to some parts of their evidence
* Corroborating evidence **does not need to implicate** the Accused - **its purpose is only to credibility** to evidence of the Vetrovec Witness.
* **Judge sometimes will review some corroborating evidence that might be considered to give guidance on what types of evidence to look for** (***Dhillon***)

# *R. v. Murrin* [1999] SCBC *In-custody confession is admissible no matter how bad a Vetrovec witness they are. It is up to the trier of fact to determine credibility.*

*R. v. Murrin* In-custody confession was admissible. No matter how bad a witness they may be on first examination.

*Vetrovec* testimony w/ credibility & reliability issues is admissible for jury (goes to weight).

Must be PE to be inadmissible.

# *R. v. Khela* [2009] SCC *Corroboratory evidence must be independent and material to their story.*

**Facts:** Accused is charged with first degree murder. He allegedly paid two men to murder the victim. The Crown's case rested primarily on the testimony of two unsavoury **Witnesses** with lengthy criminal records, **both members of a prison gang**. Trial judge directed the jury to scrutinize their testimony with the greatest care and caution, and to seek extrinsic evidence of their credibility. Accused was convicted. He appealed that the trial judge's Vetrovec warning failed to instruct the jury that to be confirmatory, evidence supporting the testimony of unsavoury Witnesses must be independent and material.

**Issue: What charge to the jury should the judge give for corroborative evidence?**

**Discussion:**

1. **One view is simplicity**: giving the jury **freedom to use any evidence to prove credibility** of Vetrovec Ws
2. The **other view** is stringency, as it is **in the UK system, where every piece of their story has to be confirmed**. (when it comes to ***accomplices***)
3. **SCC finds a middle ground**:
   * **Re-examination and corroboration shouldn’t be limited just to accomplices**.
   * **Doesn’t need to be strict corroboration** that accused is perpetrator.
   * The jury is to be instructed to **consider the Vetrovec evidence and the rest of the Crown case**, and to seek **evidence** **independent** **of the Vetrovec W**, **which backs a material and important part of their story.**
   * “**Independent**” means that the corroborative evidence **should not be tainted by any connection to the Vetrovec W**.
   * “**Material**” means that the less significant parts of their evidence do not have to be proven. However, it also means that the most significant and important parts have to be corroborated.
   * In **cautioning the jury**, the trial **judge** was required to **draw its attention to the testimonial evidence requiring special scrutiny**, explain why the **evidence was subject to special scrutiny**, warn of the **danger to convict on unconfirmed evidence**, and **instruct the jury to look for evidence from another source** tending to show that the untrustworthy witness was telling the truth as to the guilt of the Accused.
4. In this case, the judge captured the substance of a proper Vetrovec warning (***R. v. Sauve***):
   * 1. Vetrovec Witness Evidence is to be ***separated*** ***from the rest of the evidence***.
     2. ***Remind*** the jury of the reasons **why** the Vetrovec Witness is in ***this special category*** (criminal history, inconsistent testimony, benefit to witness for testimony, etc.)
     3. Permitted to use ***Vetrovec Witness Evidence alone to convict*** – but it ***would be dangerous*** to do so.
     4. Should be looking to ***corroborating evidence from an “independent” source which backs up a “material” part of the Vetrovec evidence***.
5. In this case, the judge's instructions were incorrect to the extent that he failed to point to the jury that not all evidence will corroborate Vetrovec testimony. However, those comments would not have reasonably been thought to affect the verdict.

Girlfriends of Vetrovec Witnesses corroborated some of their evidence – but how reliable is that? As Girlfriends they are highly suspect for collusion. Can this really be considered as “**independent**” sources of information?

**Ruling:** Appeal dismissed

**Some courts, as well as Nikos, would like to see two more parts to the instructions**:

* **Even if the Vetrovec Witness is confirmed by corroboratory evidence, still proceed with caution**
* **The amount of corroboratory evidence required to establish credibility of the Witness should depend on the unsavouriness of the Witness.**

**Conviction**

**Regular Evidence (BARD)**

**Independent Corroborating Evidence**

**(BARD!?)**

**Vetrovec Evidence**

# *R. v. Dhillon* [2002] ONCA *Corroborative evidence should not merely show possibility of the Witness being honest, it must go beyond that.*

**Facts:** Accused is convicted of murder of someone of whom he had no previous knowledge. The evidence is highly circumstantial and flawed, but the conviction rests on testimony of a jailhouse informant. The informant was very fishy, with over 40 previous convictions, and a history of being denied as an informant. The corroborative evidence is also very fishy. As in it stinks. Of fish. And fish-like substances.

**Issue:** What level of corroborative evidence is necessary to accept this Vetrovec evidence?

**Discussion:**

* Must be independent of the Vetrovec evidence and **cannot confirm mere peripheral parts** of the evidence.
* Mere **marginal support** for the W’s evidence is **not sufficient**.
* The Vetrovec Witness is key to the Crown case.
* So, given the ***Sauve***Test, **there has to be a significant amount of evidence to support the W’s credibility**.
* **Six out of seven** pieces of corroborative evidence brought forth by the Crown are **insufficient**, and **one** is **marginal.**
* The insufficient ones merely show that the Witness could possibly be honest, and that **Accused could have confided to him, without increasing the likelihood of Accused actually confiding to him**.
* This is not enough.
* Fish fail!

**Ruling:** Appeal allowed and new trial ordered.

**280.2 Extrinsic Misconduct Evidence**

**Nikos Harris, “Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship” 2005**

* A framework which provides a trier-of-fact with too broad a discretion to rely on the evidence of a Vetrovec W increases the risk of wrongful convictions, each one of which diminishes the reputation of our criminal justice system.
* A trial judge has a broad discretion in terms of the particular content and structure of this caution
* The rules concerning confirmatory evidence might be summarized as merely requiring that the trier-of-fact carefully examine the testimony of the Vetrovec W in the context of the evidence as a whole and determine whether or not they believe the W’s evidence.
* It is submitted, however, that the rules concerning the evaluation of confirmatory evidence for Vetrovec W are much more complex than that. Not only are a number of areas of evidence not capable as serving as confirmatory evidence, but also the presence of some confirmatory evidence does not equate with making it safe to convict on the evidence of a Vetrovec W.
* The entire purpose of the Vetrovec caution, which is to protect against the risk of wrongful convictions based on unreliable evidence, is undermined if a trier-of-fact is provided with the impression that it is safe to convict an Accused based on the evidence of a Vetrovec W which is supported by any other evidence in the Crown case.
* A trier-of-fact should understand that not all Crown evidence is capable of serving as confirmatory evidence, as well as that caution must be exercised even where there exists some independent evidence which supports a relevant part of the W’s testimony.
* The rules concerning confirmatory evidence for Vetrovec W might be summarized as follows:
  + the confirmatory evidence must be independent of the Vetrovec W and an additional warning may be required if there is a risk that consistencies between the testimony and other evidence are the product of details of the offence the W learned from sources other than the Accused. Evidence which is tainted through connection to the Vetrovec W cannot serve as confirmatory evidence.
  + the confirmatory evidence must relate to a relevant part of the W’s testimony and must be able to support a rational inference that the W is more likely to be telling the truth;
  + the more profound the W’s trustworthiness problems, the more cogent the confirmatory evidence must be in order to make it safe to rely on the evidence of a Vetrovec W;
  + the confirmatory evidence should generally be reliable in its own right, and particularly if the confirmatory evidence comes from only one source or the trustworthiness concerns regarding the Vetrovec W are particularly profound;
  + Even in the presence of substantial confirmatory evidence, a trier-of-fact should still exercise a degree of caution in relying on the evidence of a Vetrovec witness.

# Eye Witness Identification

This is one of leading causes of wrong convictions in North America.

# *R. v. Gonsalves* [2008] OSCJ *Eye witness in-court identification is dangerous, and requires a stringent charge to the jury. Requires that the steps of identification by the eye witness are independent and unbiased.*

**Facts:** Three accused allegedly robbed complainants of their money and 3 speakers. The complainants later identified one of the accused independently from photo line-ups.

**Discussion**:

* The photo line-ups were done separately, and although nothing was recorded (court strongly prefers recorded identification procedures) the court accepted the identifications as admissible.
* The admissibility was despite some minor discrepancies regarding facial hair, and a hat on the accused not matching up.
* However, the police officer claimed that he wrote everything down, so the lack of recording wasn’t fatal.
* In addition the photo-line up’s were done only 11 days after the alleged robbery so the judge wasn’t worried about the memory of the W’s.
* Eye witness in-court identification can be very powerful, but it is dangerous, being deceptively credible, because it is honest and sincere.
* Must be wary of collusion between witnesses.
* The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.
* It is problematic not because of credibility issues, but from reliability standpoint.
* But a jury might be concerned if W was not asked to identify an Accused in court as the perpetrator and might draw an unjustified adverse inference against the Crown if the question was not asked.
* Moreover, the inability of W to identify Accused in court as the perpetrator is entitled to some weight.
* Some factors that it may be more reliable: if W knows Accused, view, proximity, time.
* The instruction to the effect that such identification should be accorded "little weight" does not go far enough to displace the danger that the jury could still give it weight that it does not deserve. Judge has to clearly set out the risk of mistake.
* It would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a W and the accuracy of that W.

PREJUDICIAL nature increases as time continues…

* **ID’ing somebody in court is highly prejudicial and not particularly probative**…
* **The closer the ID is to the actual event, the more reliable and probative the ID actually is**.

**Ruling:** Gonsalves has been readily and credibly identified. Accused is guilty on both counts of indictement.

**Better approach to photo line-up…**

1. **Don’t have a limited number of photos… (more likely to pick one of a pre-determined number of photos… the accused must be one of them)… just keep showing photos without indicating how many photos there are in total.**

# Opinion Evidence

In the law of evidence, **an opinion means an ‘inference from observed fact’**. A basic tenet of our law is that the usual **Witness may not give opinion** evidence, but **testify only to facts** within his knowledge, observation and experience.

The major **exception to this is the expert Witness**.

## Common Knowledge

# *R. v. Graat* [1982] SCC *A Witness can provide an opinion regarding something that is within common knowledge and doesn’t require expert qualifications.*

**Facts:** The trial judge accepted the opinion evidence of two police officers that the Accused’s ability to drive had been impaired by alcohol and convicted him under s.234 of the Code. Accused appeals to determine whether a court may admit opinion evidence on the question to be decided - here, whether the appellant's ability to drive had been impaired by alcohol.

**Issue:** Is common knowledge opinion admissible?

**Discussion:**

* The question whether a person's ability to drive was impaired by alcohol is one of fact, not of law, and non-expert Ws may give evidence as to the degree of a person's impairment.
* The guidance of an expert is unnecessary.
* The value of opinion will depend on the view the court takes in all the circumstances.
* The judge, however, should not consider the opinion of police officers in a preferential way merely because they may have extensive experience with impaired drivers.
* Here, the non-expert evidence was correctly admitted.
* The Ws all had an opportunity for personal observations.
* Based on the P/P balance, there are limits on allowing first-hand non-experts to be give opinion evidence.

**Ruling:** Appeal dismissed.

## Lay Opinion Will Be Inadmissible:

* If there is a question whether the W is drawing a logical inference from the facts
* If the facts upon which the opinion is based are too speculative.
* When having a W provide an opinion that is phrased as legal conclusion. One should be careful about having too much invasion into the role of the trier of fact. Opinions are to assist trier of fact in assessing, not to provide a conclusion and tell trier of fact what they should concluded. (e.g. W can provide opinion that “Accused seemed intoxicated” but can’t say “Accused was too intoxicated to drive”)
* If the lay W is trying to give evidence that goes beyond common knowledge into expert evidence (e.g. lay W can’t say “X fell down and was having a heart attack)
* Because W can give an opinion there may be very significant issues of weight involved. Is the lay W really qualified to draw this inference even if it is out of common knowledge? Does the lay W have a certain background that would lead them to certain conclusion?

# Expert Evidence

## *Canada Evidence Act 7.Expert Witnesses*

*Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.*

## *Criminal Code*, Section 657.3 Expert [testimony](http://everything2.com/title/testimony)

657.3 (1) In any proceedings, the evidence of a person as an expert may be given by means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert if  
  
(a) the court recognizes that person as an expert; and  
  
(b) the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence.  
  
Attendance for examination  
(2) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration or report.

• Expert evidence is one of the few areas where defence has disclosure obligations.

• There is an inherent problem with expert evidence in current Canadian Criminal system. It costs a fair amount of money to hire an expert W, and often the amount of money that the leading experts will cost, will often be more expensive than the money potentially received from the lawsuit.

**Voir Dire:** A “trial within a trial.” It is a hearing to determine the admissibility of evidence, or the competency of a

W or juror, conducted prior to to the trial.

# R. v. Mohan [1994] SCC *Expert evidence (to character) will be admitted if the expert is qualified and the information is relevant, necessary, and not otherwise susceptible to an exclusionary rule.*

**Facts:** Accused, a practising pediatrician, was charged with four counts of sexual assault on four female patients aged 13 to 16, during medical examinations conducted in his office. A psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint that of a sexual psychopath. The psychiatrist intended to testify that Accused did not fit the profiles of those unusual groups, but the evidence was ruled inadmissible. Accused was found guilty by the jury and appealed. ONCA allowed his appeal and ordered a new trial.

**Issue:** Can expert evidence (to character) be admissible?

**Discussion:**

* Expert evidence advancing a novel scientific theory should be subjected to special scrutiny to determine whether it met a basic threshold of **reliability**, and whether it was necessary in the sense that the trier of fact would be unable to come to a satisfactory conclusion without the assistance of the expert.
* The closer the evidence approached an opinion on an ultimate issue, the stricter the application was of this principle.
* Evidence of an expert that Accused, by reason of his or her mental make-up, would be likely/unlikely to commit the crime does not fit into the categories of reputation in the community with respect to a trait or specific acts of good conduct, both of which types of evidence could be led by an Accused.
* Before the experts opinion as to disposition was admitted into evidence, the trial judge must be satisfied that either the perpetrator of the crime or Accused had distinctive behavioural characteristics such that a comparison of one with the other would be of material assistance in finding guilt.
* A finding that the scientific community had developed a standard profile for the offender who committed the type of crime in issue would satisfy the criteria of relevance and necessity.
* The evidence would qualify as an exception to the exclusionary rule relating to character evidence provided the judge was satisfied that the proposed opinion was within the field of expertise of the expert W.
* In this case, nothing in the record supported a finding that the profile of a pedophile or psychopath had been standardized in the scientific community.
* The experts profiles were not sufficiently reliable to be considered helpful, and any value it might have had would be outweighed by its potential for misleading or diverting the jury.
* The evidence should be excluded.

**Ruling:** Appeal allowed

**Expert Evidence Test:** (***R. v. Mohan***) Onus is on the party calling the expert to establish on BP

1. Is the evidence that the expert would provide **relevant** to a material issue?
2. Is it absolutely **necessary** to assist the trier of fact: when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. The necessity requirement is made more stringent by ***R. v. D.D.***
3. How **qualified** is the expert?
   1. Not usually controversial for admissibility, but will often become a weight issue when it comes to consideration of leading expert or just a run of the mill expert
   2. Will the evidence assist the trier of fact in drawing an inference relative to the case?
   3. Is the evidence reliable? (if the scientific method used is novel, look at the***R. v. J.L.J.***Test).
   4. If expert evidence that goes to a relevant area is either too conclusive or too complicated, one should question if it will really help the trier of fact.
   5. Will the evidence overwhelm the jury or be too directive in telling the jury what to conclude?
4. Also, the opinion of an expert must not only pass those standards applicable to expert evidence but must also comply with other rules of evidence, such as other exclusionary principles, and P/P balance. (**Other Exclusionary Rules)**

**280.3 Opinion Evidence**

**A major concern with expert evidence is that the expert can usurp the role of the jury**

* There are some circumstances where you cannot get around the expert commenting and providing a direct opinion (such as insanity defence);
* However, the court will prefer if the evidence is presented in a way which is less directive
* There are **ways to prevent the expert from usurping the role of the jury**.
  1. Using **hypothetical questions**;
  2. **Avoiding having the expert go to the ultimate issue** in the case (i.e. **“what factors make it more likely for an organization to be a cult” instead of “does this seem like some sort of crazy cult?**”);

**Hypothetical Question:** Factual scenario that reflects the facts that the part hopes to prove.

**Test for Admissibility:**

1. The closer the opinion of the expert goes to ultimate issue at trial (verdict), the stricter the test for admissibility becomes (***Mohan***).
2. There is no absolute rule that counsel can’t ask the expert to give an opinion on the ultimate issue in the case, however this ***may*** result in the court being particularly tough in terms of admissibility of P/P test (***Mohan, Bleta, Bryan***)

# *R. v. Bleta* [1964] SCC *As long as the questions are phrased to make clear what the evidence that the expert is founding his conclusion on is, non-hypothetical questions are admissible.*

**Facts:** Accused was acquitted on a charge of non-capital murder. While fighting with the victim, he was knocked down and his head struck the pavement. Some Ws observed that when Accused got up he staggered and appeared to be dazed.

The victim had started to walk away when Accused, after getting up, stabbed him fatally with a knife.. Accused used defence of automation. This was supported by a psychiatrist who had not examined Accused until more than three months after the incident, but who attended his trial and listened to all the evidence as to Accused’s head injury and his behaviour immediately after receiving it. The expert was not asked hypothetical questions but was invited to express his opinion based on the evidence which he had heard. CA ordered a new trial on the ground that this evidence was inadmissible and should not have been accepted by the judge.

**Issue:** Can expressive and directive expert evidence be admissible?

**Discussion:**

* Judge can insist on hypotheticals if he feels that this is the best way for the jury to understand it
* But he can waive this, as long as the jury is clear on the nature and foundation of the opinions of the expert
* If expert evidence is led as facts of case, the court will be particularly tough in terms of admissibility of P/P test
* There are two situations in which counsel does not have to use a hypothetical question:
  + If the evidence is not in dispute.
  + If the expert has dealt directly with the Accused (interviewed or examined him).
* In the present case it was clear that psychiatrist was proceeding on the hypothesis that the Accused’s blow on the head and his conduct after receiving it were as described by the Crown Ws, and that Accused’s condition as to amnesia, headaches and other symptoms were honest.
* During the trial, all sides were satisfied that a proper basis had been laid for the admission of the doctor's opinion.
* The trial judge was justified in assuming that the hypothesis on which the psychiatrist based his opinion had been made clear to the jury, and he was justified in admitting this evidence.

**Ruling:** Appeal allowed and acquittal restored.

# *R. v Palma* [2000] OSCJ *Expert opinion may rely on second hand sources. Then it becomes an issue of weight to be assigned to the expert opinion.*

**Facts**

**Issue:** Is basing expert testimony on prison files considered hearsay?

**Discussion:**

Expert knowledge skill and opinion should be based on the following:

1. **The expert’s firsthand knowledge or observation**;
2. **The evidence given at trial, usually put to a hypothetical question** (though not necessarily *Bleta*)
3. **Information or data gathered by the expert out of court**, **other than by first-hand observations**.

***Neither of the first two sources of information, alone or together, implicates the hearsay rule. The third does.***

To form an opinion, expert has to consider all possible sources of information, including second hand sources, as

long as their reliability is within professional scope.

1. **Expert may form his opinion on a basis that includes hearsay;**
2. **Expert may give his opinion on that basis, repeating the out of court information;**
3. **The opinion is admissible**
4. **The weight of the opinion may be affected by the extent to which it rests on the second-hand information, but not its admissibility; and**
5. **The opinion is not evidence of the truth of the (second-hand) information on which it is based**.

The value of the opinion may be reflective of the extent that the expert relied on second hand material, but this

goes to weight, and not to admissibility.

* The result in *Abbey* contains an inherent contradiction. The decision permits the reception of expert opinion based on hearsay, but assigns weight only to the facts that are proven within the court. This results in the following:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
2. This second hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

* The court thus clarified: as long as there is some admissible evidence to establish the **foundation** for the expert’s opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony.

**Ruling:** Appeal dismissed.

# *R. v. Bryan* [2003] ONCA *Expert evidence regarding the ultimate issue is admissible, but raises a stricter P/P standard.*

**Facts:** Accused is convicted for possession of cocaine for the purposes of trafficking. Accused possessed 2.9 grams of yay and $1,500 when he was arrested. He denied that he possessed the blow. He provided an innocent explanation for the cash. The Crown called a police officer and qualified him to give expert evidence related to the cocaine trafficking business and its proceeds. The officer testified that someone in Accused’s circumstances would be trafficking, and the funds were crime proceeds. **Accused submitted that this evidence was inadmissible and prejudicial since it went to the ultimate issue that the jury had to decide**.

**Issue:** Is the testimony admissible?

**Discussion:**

* The evidence was properly admitted. But the expert did say that it is likely that the money is proceeds from being a gansta’ and a balla’. This hits the ultimate issue on one of the charges.
* **There is no absolute rule that counsel can’t ask the expert to give an opinion on the ultimate issue in the case.**
* **But this will result in the court being particularly tough in terms of** admissibility of **P/P test**.
* No basis existed to challenge this evidence. **The expert was properly qualified. The evidence was relevant, necessary, assisted the trier of fact and was not excluded by any rule**.

**Ruling: Appeal dismissed**

## Particular Matters

There is general flexibility in admitting expert evidence, and most of the time the issues will be seen as those of weight, as opposed to admissibility. However, there are some areas of expert evidence, where admissibility becomes a serious issue.

# Credibility of a Victim

## Oath Helping: having a Witness give opinion evidence to the credibility of another Witness. This is forbidden.

# R. v. Llorenz [2000] ONCA *Evidence directly aimed at proving the credibility of the victim is inadmissible, unless if that evidence has some other legitimate purpose, and proving credibility is its mere side-effect. (Sexual Psychic 10-16yr old girl)*

**Facts:** Accused appealed his conviction of a sentence for sexual abuse, based on admissibility of portions of a psychiatrist's evidence and the adequacy of judge's charge on this evidence. Crown's case rested on the credibility of the victim. In support of her evidence, Crown examined the psychiatrist who treated her. The psychiatrist's evidence, taken as a whole, communicated to the jury the clear message that he believed the victim’s allegations of sexual abuse. The Accused appeals that this had the role of oath helping, and that the trial judge failed to properly instruct the jury that the evidence was not to be used for the purpose of bolstering the complainant's credibility.

**Issue:** Is this oath helping?

**Discussion:**

* It was open to the Crown to call evidence which provided the context in which the allegations were made and that the victim’s condition was consistent with sexual abuse. However, it was not necessary to provide the list to the jury.
* Taken as a whole, it seemed as oath-helping, and going too close to ultimate issue.
* The **prejudicial effect of the evidence outweighed its probative value**.
* Credibility of the victim will not be subject to opinion evidence
* **The rule against oath-helping** prohibits the admission of evidence adduced solely for the purpose of proving that a W is truthful. The rule applies to evidence that would tend to prove the truthfulness of the W or truth of the Ws’ statements
* Same as bad character evidence, evidence may come in, which effects credibility but may have another purpose
* So, evidence may still be admitted if, in addition to being oath-helping it has some other legitimate purpose
* In this case, **expert’s testimony gave a clear message of bolstering victim’s credibility**.
* There was a **serious likelihood that the jury attached substantial weight to the belief of the psychiatrist that the victim was telling the truth**.
* **The trial judge did not sufficiently instruct the jury on the use of the expert evidence**.

**Ruling:** Appeal allowed

# *R. v. J.-L.J.* [2000] SCC *Novel scientific methods are to be subjected to special scrutiny to be admitted as evidence.*

**Facts:** Accused was charged with sexually assaulting two young boys. He sought to introduce a psychiatrist's testimony into evidence to establish that the offences were probably committed by a serious sexual deviant and that various tests of Accused had disclosed no such personality traits. The trial judge excluded this evidence on the basis that it only showed a lack of general disposition and was not saved by the distinctive group exception. The Accused was convicted, and appealed. The QCA allowed the appeal and ordered a new trial on the ground that the psychiatrist's evidence had been wrongly excluded. Crown appealed to SCC.

**Issue:** Is a **new** **behavioural profiling** **technique** **admissible expert evidence**?

**Discussion:**

* **In order to rely on the distinctive group exception**, it had to be shown that **the crime could *only* have been committed by a person having *distinctive* personality traits** that the Accused did not possess.
* When considering novel scientific methods**, the basic *Mohan* factors are applicable (Qualified, Relevant, Necessary, Not Otherwise Excluded)**
* But there is **another test to consider**
* Recent years have seen an increase in expert Ws. This raises a risk of using scientific evidence, which may be discredited some time down the road, such as hair evidence or physiognomy was in the past. This means that **the courts should be cautious about new scientific methods, regarding them with specific scrutiny.**
* **In the case at bar, the new behavioural profiling procedure fails** several of the basic **reliability** criteria, **as well as** raises the basic ***Mohan***issue of going to **ultimate issue**.
* The **evidence** also **was presented by way of opinion rather than objective information** (**Expert Testimony should only be presented to *help* the *trier of fact* make a decision**.)
* In addition, the **test is being used in a unique/novel way**.
* There was **also** a very real possibility that evidence of a **high error rate (almost 50% false negative in this case)** in these tests would distort the fact-finding process.
* **All of this made it inadmissible**.
* This case sends a general message that courts need to tighten up admissibility standard for all expert evidence.
* **Critical statement from the court: trial judge should take seriously its gatekeeper role**

**Ruling:** Appeal allowed and conviction restored.

## Novel Scientific Evidence Test:

1. Can it satisfy the standard ***Mohan***test,
   1. Even **stricter** application of the “**necessity**” and “**reliability**” inquiries **where the expert opinion approaches an ultimate issue**.
2. **Is the science in question sufficiently reliable** to put before the court. Some of the other factors to consider are:
   1. Has the **technique been tested, or can it be**?
   2. Has the theory or technique been **subject to peer review**?
   3. Is the **error rate** known?
   4. Is this **generally accepted in the scientific community**?
3. Even if the practice is established, if the underlying scientific theory is realistically challenged because of changes in the base of knowledge, the **expert evidence should not be admitted without confirming the validity of the underlying assumptions**.

**280.3 Opinion Evidence**

# *R. v. D.D.* [2000] SCC *SCC limits expert evidence to cases where it is absolutely necessary.*

**Facts:** Accused was charged with sexual assault and invitation to sexual touching. The 10-year-old victim alleged that Accused sexually abused her when she was five or six years old. The victim **did not tell anyone about the alleged assaults for two and a half years**. The Crown sought to call a child psychologist to provide expert evidence that a child's delay in alleging sexual assault was not an indication that the allegations were false. The trial judge admitted this evidence and Accused was convicted. CA held that the evidence should not have been admitted because it was neither relevant nor necessary. Crown appealed to SCC.

**Issue:** Is it time to shuffle up the rules for expert evidence?

**Discussion:**

* **SCC goes on a rant against expert Ws – they should be the exception not the rule.**
* There is a whole industry of expert Ws forming around the court system
* There is **an easy slide from impartiality into shopping for experts** - **especially when it comes to experts who are called in repeatedly to testify on similar evidence**. (i.e. a particular “expert” who is either crown friendly or defence friendly.)
* There has been **more and more evidence linking expert Ws to wrongful conviction**
* Expert evidence increases the time and cost of litigation
* The **fees charged by so many experts required** may lead to bias for litigants with **increased time and costs**.
* Expert reputation and knowledge makes it **very challenging to cross-examine** **or contradict** them for non-experts
* Expert Ws will be ***tolerated only when the jury absolutely requires assistance*** in their decision.
* The ***Mohan***test is still applicable, but more stringency and importance is put on the **“necessity” element**.
* In the **case at bar**, the psychologist's evidence had **no technical quality sufficient to meet** this threshold of **necessity**.
* Rather, a judge should have made mention of the childhood trauma and delay of charges in their address to **the jury. They are all reasonable adults who would have figured this shit out themselves**.

**Ruling:** Appeal dismissed.

# *R. v. Abbey* [2009] SCC - (teardrop tattoo) - *Tear drop tattoo expert evidence could have been admitted if properly limited – scientific validity is not a condition precedent to the admissibility of expert opinion evidence (opens the door to bring in more expert witnesses – but must be limited in scope)*

**Facts: Mr. Abbey was charged with the 2004 murder of a member of the Galloway Boys crew in Toronto**. He was an admitted member of a rival gang, which was in the midst of a violent turf war with the Galloway Boys at the time of the murder. **A few months after the murder, Mr. Abbey had a teardrop tattoo inscripted on his face**. Based on interviews conducted with gang members over a 25 year practice, the expert witness was able to testify that inscription of the teardrop tattoo could mean that the person with the tattoo had killed a rival gang member. The trial judge had excluded the evidence from consideration by the jury as he considered it was not sufficiently reliable. The Court of Appeal overturned the decision and ordered a new trial.

**Issue:**

**Discussion:**

* Expert testifies that…Three possible explanations for a teardrop tattoo…
  + Death of a fellow gang member or family member
  + Having served a period of incarceration in a correctional facility
  + Murder of a rival gang member
  + (First two are eliminated in the process of the other evidence at trial)
* “It is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. **The trier of fact must then decide whether to accept or reject the expert’s opinion as to the appropriate factual inference**. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases.”
* Start with ***Mohan*** test (Relevance; Necessity; Absence of Exclusionary Rule; Qualified Expert)
* Go to P/P Balance
* **But… scientific certainty is not necessarily a condition precedent to the admissibility of expert opinion evidence**. **What is more relevant is *how* the evidence is presented**.
* Expert evidence is routinely heard and acted upon in the courts which cannot be scientifically validated. (For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, etc.)
* **Sometimes experts** do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they **refer to specialized knowledge gained through experience and specialized training in the relevant field**.
* In this case, in order to test the reliability of the opinion of these experts and Dr. Totten using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole.
* All things considered **– the judge should have let expert testify because he would have said that there are 3 possible meanings to tattoo – the expert opinion would therefore not have usurped the trier of fact because it offered other possible interpretations**. (Trier of fact would still be able to decide for itself.)

**Ruling:** Appeal allowed. (Acquittal overturned new trial ordered)

# Witnesses

There is a presumption that ALL Witnesses are both:

1. Competent
2. Compellable

But there are certain exceptions… usually mental capacity, physical ability to communicate and youth.

**CANADA EVIDENCE ACT – Witness Capacity/Oaths**

**Who may administer oaths**

**13.** Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

R.S., c. E-10, s. 13.

**Solemn affirmation by witness instead of oath**

**14.** (1) A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

**Effect**

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

R.S., 1985, c. C-5, s. 14; 1994, c. 44, s. 87.

**Solemn affirmation by deponent**

**15.** (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, “I, ......., do solemnly affirm, etc.”, and that solemn affirmation has the same force and effect as if that person had taken an oath.

**Effect**

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

R.S., 1985, c. C-5, s. 15; 1994, c. 44, s. 88.

**Witness whose capacity is in question**

**16.** (1) If a proposed witness is a person of **fourteen years of age or older whose mental capacity is challenged**, the court **shall**, before permitting the person to give evidence, **conduct an inquiry** to determine

(a) whether the person **understands the nature of an oath or a solemn affirmation**; and

(b) whether the person is **able to communicate the evidence**.

**Testimony under oath or solemn affirmation**

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

**Testimony on promise to tell truth**

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

**Inability to testify**

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

**Burden as to capacity of witness**

(5) **A party who challenges** the mental capacity of a proposed witness of fourteen years of age or more has the **burden of satisfying the court that there is an issue as to the capacity** (***Balance of Probabilities***) of the proposed witness to testify under an oath or a solemn affirmation.

R.S., 1985, c. C-5, s. 16; R.S., 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26.

**Person under fourteen years of age**

**16.1** (1) **A person under fourteen years of age is presumed to have the capacity to testify**.

**No oath or solemn affirmation**

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

**Evidence shall be received**

(3) The **evidence** of a proposed witness under fourteen years of age **shall be received** if they are **able to understand and respond to questions**.

**Burden as to capacity of witness**

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

**Court inquiry**

(5) **If the court is satisfied** **that there is an issue** as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, **it shall**, before permitting them to give evidence, **conduct an inquiry to determine whether they are able to understand and respond to questions**.

**Promise to tell truth**

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

**Understanding of promise**

(7) **No proposed witness under fourteen years of age shall be asked** **any questions regarding their understanding of the nature of the promise to tell the truth** for the purpose of determining whether their evidence shall be received by the court.

**Effect**

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

2005, c. 32, s. 27.

# *R. v. J.Z.S.* [2008] B.C.J. No. 1915 -

**Background**

In 2006, J.Z.S. was charged with the sexual assault of his 7 year old son and 10 year old daughter. **The Crown applied at trial to have the children**, now aged 8 and 11, **testify behind a screen** along with a support person in accordance with sections [486.1](http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec486.1subsec1) and [486.2](http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec486.2subsec1) of the Criminal Code and section [16.1](http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec16.1subsec1) of the Canada Evidence Act, R.S.C. 1985, c. C-5. In turn, **the defence challenged the constitutionality of those provisions on the ground that it deprived the accused of a fair hearing and violated his rights under s. 7 and 11(d) of the Charter**. The trial judge rejected the constitutional challenges and sentenced J.Z.S. to 24 months imprisonment.

Undeterred, the accused sought and was granted leave to appeal. The questions of law to be decided were whether s. 486.2 of the Criminal Code and/or s. 16.1 of the Canada Evidence violated s. 7 and/or s. 11(d) of the charter. The Supreme Court adopted the B.C. Court of Appeal’s reasons as follows...

**The B.C. Court of Appeal**

**486.2 (1)** …in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or **behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.** [emphasis added] (Criminal Code)

The Court begins by noting that the current provisions are part of a string of legislative reforms implemented for the purpose of facilitating children’s testimony while ensuring the rights of the accused are protected. The findings from the Child Witness Project at Queen’s University concluded that child witnesses can be equally as reliable as adult witnesses, and upon a promise to tell the truth are more likely to do so.

**What, then, are the rights of an accused under s. 7 and s. 11(d)?** An accused’s **right to fair trial, and to make full answer and defence must be balanced against the broader societal interests** at hand. In **R. v. Levogiannis**, [[1993] 4 S.C.R. 475](http://www.canlii.org/en/ca/scc/doc/1993/1993canlii47/1993canlii47.html) the court held that an **accused does not have an absolute right, as a basic tenet of the justice system, to an unobstructed view of a witness who testifies against the accused**. That right is subject to the broader societal needs, in particular the need to protect and encourage child witnesses when they are testifying. As MacDonald J.A. (as he then was) stated in **R. v. R.(M.E.**):

The **right to face one’s accusers is not in this day and age to be taken in the literal sense**. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it.

**16.1 (1)** A person under fourteen years of age is presumed to have the capacity to testify. (Canada Evidence Act)

Unlike the repealed s. 16 of the Canada Evidence Act, s. 16.1 introduces a presumption that a child is competent to testify unless the challenging party puts that capacity in issue. **The accused argues that it is unsafe to rely on children’s evidence unless their capacity has been shown, and they have demonstrated an understanding of the moral obligation to tell the truth**. **The legislative reforms, however, show acceptance of the reliability of child witnesses and the findings of the Child Witness Project**.

**In addition**, s. **16.1 does not restrict** the traditional safeguards that protect an accused’s right to a fair trial; namely, the rights to: be **presumed innocent** until proven guilty, to **cross-examine** witnesses (***including the right to challenge the childs ability to tell the truth or understand what it means to tell the truth***), to **call evidence**, and to have the alleged **offence proven beyond a reasonable doubt**. (It is worthwhile to note that the accused was convicted on the **totality** of evidence including statements he himself had made to the police.) As L’Heurex-Dube J. pointed out in her dissent in **R. v. Marquard**, [[1993] 4 S.C.R. 223](http://www.canlii.org/en/ca/scc/doc/1993/1993canlii37/1993canlii37.html), “**conventional assumptions about the veracity and powers of articulation and recall of young children are largely unfounded**”. It is only now, with a fuller understanding of the reliabilities of children, do the current provisions properly reflect their weight as witnesses.

**Conclusion**

**Both the B.C. Court of Appeal and the Supreme Court found that neither s. 486.2 of the Criminal Code nor s. 16.1 of the Canada Evidence Act violate the Charter rights of accused persons**.

# SPOUSES

## COMMON LAW RULE – Spouses are not competent, except in matters of violence, etc.

## Canada Evidence Act

**Accused and spouse**

**4.** (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged**, is a competent witness for the defence**, whether the person so charged is charged solely or jointly with any other person.

**Accused and spouse**

(2) The wife or husband of a person **charged** with an offence under **subsection 136(1) of the *Youth Criminal Justice Act*** or with an offence under any of sections **151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the Criminal Code**, **or an attempt** to commit any such offence, **is a competent and compellable witness for the prosecution** without the consent of the person charged.  **[*This adds a bunch of exceptions beyond the common law rule*]**

**Communications during marriage**

(3) **No husband** is compellable to disclose any communication made to him by his wife during their marriage, and **no wife** is **compellable to disclose any communication made** to her by her husband **during their marriage**. **[*Spousal privilege – means don’t have to testify about “conversations” – as opposed to what they “saw” (see above)*]**

**Offences against young persons**

(4) The wife or husband of a person **charged** with an offence against any of **sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable** witness **for the prosecution** without the consent of the person charged.

**Saving**

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

**Failure to testify**

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

R.S., 1985, c. C-5, s. 4; R.S., 1985, c. 19 (3rd Supp.), s. 17; 2002, c. 1, s. 166.

# EXAMINATION OF WITNESSES

# ORDER OF CALLING WITNESSES

Where the accused is going to testify, an argument can be made so that they should go first so that they cannot be tainted… but is that fair?

# *R. v. Smuk* – *An accused does not have to testify first, but where/when they testify may be subject to cross-examination regarding tainting (therefore affecting the weight of the evidence).*

# *R. v. Jolivet*, [2000] 1 S.C.R. 751 – *Accused convicted of murder — Whether trial judge erred in refusing to allow defence counsel to comment on Crown’s failure to call previously announced witness* – no obligation on Crown to call a previously announced witness (unless Crown’s Conduct is highly underhanded and essentially amounts to an abuse of process and/or miscarriage of justice)

**Facts:** The accused was convicted of four counts of murder.  **At trial, the circumstances leading to the four killings were described by the Crown’s principal witness, an informer**.  At the opening of trial and again during the trial, **Crown counsel made reference to an additional witness, B, who he said would be called to testify and who, he said, would corroborate** in part the principal witness’s testimony.  **Crown counsel later declined to call B**.  When ***defence* counsel indicated that he *wished to comment* in his jury address on the Crown’s failure**, the **trial judge offered the defence the opportunity to call B and cross‑examine him, but that offer was rejected**.  The trial judge then indicated that if defence counsel commented on the Crown’s failure to call B, he would instruct the jury that B could have been called by the defence as well as by the Crown.  The Court of Appeal was unanimous in its finding that this ruling in effect prevented defence counsel from commenting on the Crown’s failure to call its previously announced witness and that this was an error of law.

**Discussion:**

* **The Crown is under no obligation to call a witness it considers unnecessary** to the prosecution’s case.
* A **statement of intention does not** necessarily **amount to an undertaking**
* The Crown’s conduct called for an explanation, but Crown counsel explained that he believed B would not be a truthful witness.
* The trial judge accepted Crown counsel’s explanation, there can be no question here of an abuse of process.
* **Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds**, provided that the modification does not result in unfairness to the accused.
* **Where an element of prejudice results (as it did here), remedial action is appropriate**.
* **The trial judge erred in** effectively (if not explicitly) **preventing defence counsel from commenting** on the missing witness B.
* **The fact that Crown counsel twice announced to the jury that B would be called produced an element of prejudice by asserting the existence of corroborative evidence**.
* The **defence was entitled to suggest to the jury that the failure to call B left an** unspecified **hole** in the Crown’s proof.  **The denial of the defence right to comment was an error of law**.
* The majority of the Court of Appeal erred in declining to apply the curative proviso.  The application of s. 686(1)(*b*)(iii) requires a court to consider the seriousness of the error in question, the effect it likely had upon the jury’s inference‑drawing process and the probable guilt of the accused on the basis of the legally admissible evidence untainted by the error.  **There is no reasonable possibility that the verdict would have been any different if the trial judge’s error had not been made**.
* While there were some inconsistencies in the testimony of the Crown’s main witness, explanations were offered for these inconsistencies and it was open to the jury to accept or reject them.
* **The trial judge instructed the jury that the evidence of the Crown’s principal witness had not been corroborated** in significant respects.
* **The fact defence counsel was not** in addition **permitted to comment** on the missing witness **lost most of its significance in light of the judge’s instruction on the lack of corroboration**.
* **It cannot be assumed that the jury had forgotten that what had been promised** by the Crown **had not** **been delivered**.

**Conclusion**:

**The accused’s cross‑appeal should be dismissed** for the reasons expressed in the Court of Appeal.

# DIRECT EXAMINATION

# LEADING QUESTIONS

**Leading Question:** questions that directly or indirectly suggest to the W the answer that he is to give, or contains the information that the examiner is looking for. Often, a leading question may be answered by a “Yes” or “No”, though not all of these are leading.

The party calling a witness should generally use open-ended as opposed to leading questions. Although the answers to leading questions are not inadmissible, the fact that they were obtained by leading questions may affect their weight.

**Two kinds of leading questions.**

1. The first kind **suggests the answer** to the Witness.
2. The second kind **presupposes the existence of a fact not presented by that W in evidence**.

**This second kind of leading question is never permissible unless the presupposed matter is not contested**.

# *Maves v. Grand Trunk Pacific Rwy. Co* [1913] ALSC *On material points, leading questions are allowed in cross-examination, but not in direct examination.*

**Facts:** PL’s horses escape and get run over by D’s train. D loses the case for damages, and appeals, alleging that the trial judge erred in preventing D’s counsel from asking leading questions of a forgetful W in a direct examination.

The W has forgotten an important part of a conversation that D wanted to obtain through leading the W.

**Issue:** What is the use of leading questions on direct examination?

**Discussion:**

* The rule is: **On material points a party must not lead his own W but may lead those of his adversary**
* This is because:
  + W has a bias in favour of a party bringing him forward
  + The party calling a W has an advantage over the adversary, in knowing what the W is expected to prove.
  + Allowing leading in this case will allow a party to extract only the beneficial parts of the story.
* **On introductory and auxiliary points, it is both allowable and proper for a party to lead their own** W.
* So, leading question cannot be used when it is sought to prove material or proximate circumstances

**Ruling:** Appeal dismissed.

# EXCEPTIONS TO LEADING WITNESSES

There are some **exceptions to the rule**, where leading questions will be accepted, **but may go towards the weight** of the evidence:

* To bring out **preliminary matters** (name, occupation, and other pedigree information).
* Where the **memory** of the W has been exhausted and there is still information to be elicited.
* In a **sensitive area**, to **avoid** the W from testifying to **incompetent or prejudicial matter**.
* In cases where a W may need some **extra assistance due to their youth, trauma, etc**.
* Where the W is **hostile to the examiner, or reluctant or unwilling to testify**, in which situation the W is unlikely to accept being "coached" by the questioner.

# Refreshing a Witness’ Memory

* The law enables counsel, subject to limits, to attempt to refresh the memory of a W.
* This can be **done either through leading them** to remember the picture more truthfully**, or presenting documentary evidence of their previous statements**.
* This give rises to two concepts:
  + **Present Memory Revived**
  + **Past Recollection Recorded**
* **These are extraordinary procedures**, so the processes **must be** followed in a **careful** manner because it is easy to taint W or process;
* Most of the time, one has to **try to revive present memory, before the past recollection** **recorder** should be relied on.

# Present Memory Revived

Subject to an exclusionary discretion where doing so would be too suggestive, a **witness may consult any document while testifying**. As long as the document sparks an actual recollection of the event recorded, the witness can present oral testimony about the event remembered.

**The document itself is not the evidence it just assists** - the document is not admissible for its truth, although it will be marked for identification.

# Past Memory (Recollection) Recorded

W may **refresh her memory in court from a document or an electronic record that was recorded reliably**. **The statement or recording itself is admitted as evidence**. (***Essentially impossible to cross-examine***)

**Past Memory Recorded Admissibility Test:**

Per *Wigmore Law of Evidence*, and set out in *R. v. Fliss* past memory recorded is a well established exception to the

hearsay rule as long as it is:

1. W has no memory of the recorded events at the time of testimony, and thus needs to resort to records.

• This does not require a total loss of memory, imperfect present recollection is sufficient

2. The document was reliably recorded:

a. The W must have prepared the record personally, or vouch for accuracy if someone else did

b. The original records must be used, or an authenticated copy must be used.

3. Made within a reasonable time when the W’ memory was sufficiently fresh to be vivid and accurate

• If the record is a document created by another, or an electronic recording, that document or recording must

have been reviewed by the witness at a time when his memory was sufficiently fresh to be vivid and probably

accurate

• There is no set standard, but it is set depending on the context of the case.

4. The W vouches that the record accurately represents his recollections at the time it was made.

• The primary significance of the distinction between present memory revived and past memory recorded is that in

the latter, the document is in substance the evidence, and must therefore meet the requirements of time,

verification, and accuracy of the past recollection recorded rule.

• Whereas in the case of present memory revived, the document is just a trigger, assisting the testimony, which is the

evidence in itself.

• There are a few statutory provision in the Criminal Code which create past recollection routes:

• Under s.715, if W provided testimony at preliminary hearing but is then not available for trial (dead, insane,

really ill, absent from Canada, etc.), preliminary hearing testimony can be brought in the trial, unless Accused can

prove they did not have a full opportunity to cross the W at the preliminary hearing

• Under ss.715.1 and 715.2 young complainants in sexual assault trials can have a videotape taken soon after

the offence and it can be entered if adopted under oath.

# *R. v. Shegrill* [1997] CA *There is no contemporaneously requirement for present memory revived. Process Defined.*

**Facts:** W’s memory is refreshed by reference to statement that she gave to the police, and by the transcript of her

testimony at the preliminary inquiry. The statement was made 6 years after the offence, and written by someone else. The W also could not read English, and had the documents translated to her in the absence of the jury.

**Issue:** Can the Crown use the transcript to refresh the memory of their W?

**Discussion:**

* W’s memory can be refreshed by transcript of their testimony during the preliminary hearing (***R. v. Coffin***)
* There is a **difference between a W who forgets something and needs notes to remember, and who, even after the notes has no memory, but testifies that the notes are accurate and true**.
* The rule for past memory recorded is that the document must be made by the W near the time of the event, or must be verified by the W when the vents are fresh in her mind. But does this rule apply to refreshing memory?
* There is **no contemporaneous requirement for simple refreshing of memory**. It should only apply to the past recollection recorder.
* This case outlines the strict procedure used to have the present memory revived.
  + Bring **application when jury is removed (be clear whether present memory revived or recollection recorded)**
  + **Identify document and explain** what counsel seeks to elicit from W
  + Judge must consider if W’s memory appears to have been exhausted
  + Judge determines if it is a situation of reviving memory or if it is past recollection recorded
  + **Judge examines document for appropriateness and reliability**
  + Improper purpose test: judge must satisfy herself that there is not an attempt (conscious or not) just to get that document into evidence; supposed to be a bone fide attempt to revive the Ws’ memory
  + **Judicial discretion according to the circumstances and attitude of W (i.e. was the statement itself a product of coercion – police or otherwise?)**
  + **Recall jury and explain** that counsel called W to refresh their memory and judge had granted permission
  + Put the **document before the W** and let them **read the appropriate section in silence without comment**
  + **Take document away**;
  + **Ask non-leading questions**
  + Opposing counsel can examine document and cross-examine W
  + Judge may give a **limiting instruction to the jury**. (re: document not for truth or credibility)

**Ruling:** Yes they can.

# *R. v. Fliss* [2002] SCC *Otherwise excluded evidence can be relied on to refresh memory. BUT…W can use only those parts of the testimony that he now recalls making, or that he authenticates as accurate at the time that his memory was fresh. (Confession during wire tap – police use wire tap during their testimony.)*

**Facts: Accused confesses to murder to** an undercover **cop wearing a wire**. The police had **authorization** to make the recording, but at trial this was found to have been **improperly granted**. The judge made the **tape and transcript inadmissible, but not the testimony of the W cop**, who had his memory refreshed by the tape. In fact, his **testimony was mostly verbatim rendition of the excluded transcript**.

**Issue: Can the memory be refreshed by otherwise excluded evidence?**

**Rules For Past Recollection Recorded:**

1. **Reliable Record**
2. **Timeliness (Contemporaneous)**
3. **Absence of Memory**
4. **Present Voucher as to accuracy**

**Discussion:**

* The statement of the W cop was crucial to Crown’s case.
* The **recording must be *reliable***.
* Trial judge denied the move to suppress the testimony of the cop as tainted. He ruled that the cop could give evidence as to his present recollection of the talk. For this, he could make use of the transcripts to refresh his memory.
* **The tape and transcript were found to be in violation of s.8 of the *Charter* (search or seizure) and were excluded**, based on the ***Duarte***ruling that secret recordings of a conversation where one person is the agent of the state are in violation of s.8.
* Any ***viva voce* evidence of a W who was not a party to the conversation**, but only heard it through the tape would have been **excluded too**.
* But the **cop was a party to the tape**, and his corrections to the transcript were fresh in his memory.
* **W must use in his testimony only those portions of the record that he now recalls**, **or** that he **authenticates as accurate** **at a time when his memory was fresh and vivid**.
* The cop had reviewed the transcript of a taped conversation shortly after the conversation took place but could not recall everything that was said. He could not therefore authenticate the entire transcript as accurate.
* Defence moves that cop testifies until his memory is exhausted, and then use the transcript.
* Trial Judge says no.

Trial Judge says that there is no such rule as “exhaustion of memory”

* The **cop was allowed to testify, and to refresh his memory, no matter if the stimulus was admissible itself**.
* It is **the narrative, not the stimulus, that becomes evidence**. The stimulus does not have to be admissible.
* But this is highly unlikely to pass the ***Shegrill***examination of evidence for memory refreshing.
* But **here, the testimony mirrored the transcript almost word for word** in some areas.
* It **went beyond refreshing the memory, it created a memory based on inadmissible evidence**. So, W cannot read a document *verbatim*.

**Ruling: Appeal allowed**.

**{re-listen to lecture recording – June 1 – part 3)**

# *R. v. J.R.* [2003] ONCA *Recorded past statements by the W can be admissible as evidence- total loss of memory is not required.*

**Facts:** Accused and his buddies kidnap four girls, rape them and abuse them, after which one of them dies. Accused is convicted of first degree murder, kidnapping, and sexual assault with weapon, etc. He appeals the murder (as opposed to manslaughter) based on the admissibility of a statement under the past recollection recorded exception to the hearsay rule, made by one of the victims. Crown W testified to a brief conversation she had with the Accused on the way to the apartment where she was led. After her testimony, to refresh her memory, Crown directed her to her statement to the police, where she gave a different version of the conversation. She still could not remember, but said that at the time of her statement the events were fresh in her memory, while the trial was 2.5 years after the events. Judge ruled that the **part of her statement that she could not remember was admissible.**

**Issue:** Is this admissible?

**Discussion:**

* At trial, it was **not disputed that the statement given was accurate**.
* The **16 hours between the events and the statement is** within the traditional bounds of **reliability**
* Although **she had a chance to talk to other victims before, there is no evidence of collusion**
* So, as long as the **testimony** passes the ***Wigmore***criteria, then it is **admissible**.

**Rules For Past Recollection Recorded:**

1. **Reliable Record**
2. **Timeliness (Contemporaneous) (WHAT IS REASONABLE DEPENDS ON CIRCUMSTANCES)**
3. **Absence of Memory (DOES NOT HAVE TO BE A TOTAL LOSS OF MEMORY)**
4. **Present Voucher as to accuracy**

**Ruling:** Appeal dismissed

# Cross-Examination

* The **opportunity to cross-examine** in order to test or to challenge a witness’s evidence **is an absolutely vital part of the adversary process**.
* As an essential component of the right to make full answer and defence, **Accused has a right to cross-examine witnesses for the prosecution without significant and unwarranted constraint**. This is enshrined in s.7 of the *Charter* and any limitation will engage *Charter* rights
* Cross-examination has **two basic goals**:
  + **Eliciting favourable testimony** from the witness
  + **Discrediting the testimony** of the witness. (Either ***Credibility*** or ***Reliability***)
* The practice in Canada is to follow the “English Rule,” which allows the cross-examiner to inquire into any relevant matter, as compared with the “American Rule,” where cross-examination is limited to subjects or topics that were covered in examination in chief and to matters relating to the witness’s credibility.
* But there are clear limits to this:
  + One cannot harass a W with questions repetitive to the point of futility,
  + One cannot go into the area of inquiry that is not relevant or helpful
* **Leading questions are allowed**.
* It is improper for Crown to ask Accused as to the veracity of Crown Ws and it is improper for Crown to question Accused as to otherwise inadmissible bad act evidence.

Considerations during cross examination that can test or undermine the strength of W’s testimony:

* Reliability: even an honest W may have misperceived a situation
* Credibility: bias, motive, prior convictions. All Ws under cross-examination have their credibility at issue.
* Inconsistent Statements: deviation from previous statements clearly goes to credibility and reliability
* Evidence of collusion between Ws: contact, relationship, etc.
* Corroboration: look for details and facts that corroborate the story
* Air of Reality: does story have air of reality?
* Accuracy of the recollection: was the W drunk, tired, distracted?
* Prior Incident: Based on prior incidents does this story seem plausible? Be cautious regarding general bad character evidence.

The Specific Scenario Issue

* Leading a specific alternative scenario goes beyond testing reliability and credibility
* It creates a risk of prejudice: in having theories without evidentiary foundation advanced; particularly to Crown;

# *R. v. Lyttle* [2004] SCC *There is no need for evidentiary foundation to advance a theory on cross-examination, as long as counsel has a good faith basis in the scenario; they can advance a hypothesis on strength of experience and reasonable inference.*

**Facts:** Accused is charged with assault with weapon for being one of a gang who viciously beat and robbed a man. The victim told a cop that the attack was over a gold chain, but the cop suspected a drug connection, which he reported to his superior Detective. Detective included this in the report, without speaking to the victim. So the entire drug related theory is based on police notes with hearsay from an unknown informant, which are in themselves inadmissible.

**Issue:** Can the theory be mentioned in court during cross-examination?

**Discussion:**

* The theory is to the benefit of the Accused, since he claims that the victim’s identification of him in the line-up is to protect the real offender - his associate in the drug ring.
* So Crown seeks to prevent cross-examination along these lines in the absence of evidentiary foundation.
* The trial judge interpreted the rule in ***R. v. Howard***to mean that is that **it is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence**.
* This created a problem – **what if you have some basic evidentiary foundation for a proposition that is not admissible?**
* ***Howard*****applies only to expert Ws**.
* The **right of Accused to cross-examine prosecution Ws without significant constraint is an essential component of the right to make a full answer and defence**. This is **protected in the Charter at s.7 and s.11(d)**
* **A question and/or specific theory can be put to a W in cross-examination** regarding matters that need not be proved independently, **provided that counsel has a *good faith basis* for putting the question**
* **Good faith** basis **is a low threshold**, **but it must be reasonable**, thus bringing in an element of objectivity
* **Limits:**
  + **Harassment**
  + **Misrepresentation**
  + **Repetitiousness**
  + **Prejudicial effect outweighs probative value**

**Ruling:** Appeal allowed and a new trial ordered.

## Brown v. Dunn Rule: if counsel is going to challenge the credibility of a W by calling contradictory evidence, the W should be given a chance to address the contradictory evidence in cross-examination while he is in the W-box (*Brown v. Dunn* [1893] HL)

# *R. v. Carter* [2005] SCC *Brown v. Dunn rule (W given chance to address contradictory evidence) is not an absolute, and should be applied with deference to counsel competence.*

**Facts:** At the trial level, defence counsel failed to cross-examine a Crown W. After the conviction, Accused appeals that absence of such cross-examination is a mistake of law.

**Issue:** Is the failure of defense council to challenge a W on credibility sufficient for a re-trial?

**Discussion:**

* **It is not fair to a W to adduce evidence which casts doubt on his words, without giving him an opportunity to address it**.
* But the application of the ***Brown v. Dunn*****principle is not absolute** and must be tailored to the circumstances.
* The application of the rule requires a holistic analysis, rooted in the circumstances of each case:
  + **Failure to ask about *significant matters*** upon which you will ultimately attempt to rely **will engage the rule.**
  + **Failure to put details to a W will not (**engage the rule)**.**
* **Defence may choose to be non-confrontational and to not question the W**.
* **Look at cross**-**examination as a whole** – was the W given ***some*** kind of an opportunity to respond? Was the W put on notice? – If yes, then the rule is satisfied.
* Counsel **should not invite the juries to draw inferences against the credibility of W because of “non-confrontation” except in the clearest of cases**.
* **Counsel’s decision to not question the W, whether by tactical decision, or mere oversight, should not be relied on as proof of anything**.
* But it cannot be relied on as a “mistake of law” to appeal a decision. It is assumed that counsel is competent and knows what they are doing. Both he and his client have to live with his decisions.

**Ruling:** Appeal dismissed.

# Re-Examination and Rebuttal Evidence

# Re-Examination (re-examine witness after opposing cross-examination)

* **When a new issue is brought at cross-examination that was not brought up in direct examination**, the party that led the W can choose to re-examine them. But this is to be used sparingly.
* **Standards for permitting re-examination**:
  + Only where the **cross-examination has raised new issues.** (i.e. – cross: “You were engaged in a law suit with the victim 6 months before they died?” “Yes”)
  + **Achieved via non-leading questions**. (i.e. “How did the lawsuit end?” “It was resolved out of court.” “How was your relationship afterwards?” “We remained friends and I made him godparent to my child.”)
  + **If the Crown has already brought up an issue on direct examination**, then **much less likely re‑examination will be allowed**.

# Rebuttal Evidence (Crown gets to go again/call new evidence after defence)

* The idea of the Crown calling testimony after the Accused has put forth their case. This **allows Crown to put forth new theories or scenarios once Accused has successfully defended themselves** – after Crown’s original accusations.
* It is **generally not permitted** because a **limit needs to be put on litigation**, and the **Accused has a right to know the case against her before presenting hers**.
* One could apply to re-open Crown’s case, but there is a strong presumption against this, with **stricter rules than re-examination**
* Generally, it will be **allowed where the Accused puts forward some evidence or theory that Crown could not have reasonably anticipated**.
* Also, in cases of alibi, Accused has to disclose their case with the prior notice
* **Defence will often avoid this by making disclosure**, because **rebuttal places Crown testimony as the last thing that the jury will hear**.

## Rebuttal Evidence Admissibility Test:

As general rule the Crown cannot split its case and bring in new evidence.: must enter own case and relevant evidence that it intends to rely upon for all issues in the pleading. However, per *R. v. Krause* [1986] SCC, rebuttal evidence can be permitted where:

1. The **issue** brought by Accused **could not have been reasonably anticipated** or expected
2. Has to be a central issue, not a collateral issue: **new issue raised must go to the centre of the case and cannot be purely a credibility issue**.

# *R. v. Moore* [1984] ONCA *Only matters touched on cross-examination can be covered at re‑examination.*

**Facts:** Accused and two friends cooperated in planning a robbery of a taxi driver and assisted in summoning a specific cab on a certain night and in locating a site to get rid of the cab. Accused did not accompany the others during the actual robbery but knew that they would be armed. The two others murdered the cab driver in the course of the robbery and were subsequently arrested. One of them confessed to the police and Accused was then arrested. All three were convicted with first degree murder. Accused appealed on the grounds of being a pansy.

**Issue:** How much of a pansy is Accused?

**Discussion:**

* If Defence has cross-examined on part of a statement, the Crown cannot re-examine on the rest of the statement
* The **re-examination has to deal only with something that was brought up at cross**.
* Judge may grant leave to counsel to cross-examine his own W on a prior inconsistent statement even at the stage of re-examination where the W in cross-examination has given evidence on a material matter which is contrary to a prior statement.
* But there was no basis for this.
* The trial judge erred in permitting Crown counsel to re-examine one of their W, but that error could not form the basis for a new trial.

**Ruling:** Appeal dismissed.

# Prior Statement Evidence (Credibility/Reliability)

## Prior Inconsistent Statements

* If a **W provides a statement in court that is inconsistent with a statement given before**, this is a classic case of cross examination, having impact on credibility and of the W.
* **Used for credibility/reliability.**
* **Not allowed to be used as evidence of the truth** – **unless adopted by witness in testimony**.

## Prior Consistent Statements

* **As a general rule**, prior **consistent statements are not admissible** evidence, because they are:
  + **Prejudicial**
  + **self-serving**,
  + have **low probative value**,
  + **extends litigation unnecessarily**.
* But there are some **exceptions**:
  1. For the purposes of **supplementing the narrative** and **showing consistency of conduct** (***R. v. Ay***)
  2. Prior consistent statements can be admitted **where it has been suggested that a W has recently fabricated portions of his evidence** (***R. v. Stirling***)
     + This does not require that an allegation of recent fabrication be expressly made - it is sufficient that the circumstances of the case reveal that the "apparent position of the opposing party is that there has been a prior contrivance"
  3. **Prior identification of Accused** (***R. v. Swanson***)

# Canada Evidence Act, RSC 1985, c C-5

Cross-examination as to previous statements

**10.** (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness’ attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

# *R. v. Ay* [1994] BCCA *The existence of prior consistent statements can be mentioned to supplement the narrative and show consistency of conduct, but their actual content is inadmissible.*

**Facts:** Accused is convicted for several sexual offences involving the same victim and occurred when the she was between 5 and 17 years old. She does not press charges until she is 30. Accused, his wife, and his friends present a completely different story from that given by her. Accused argued that inadmissible evidence of the victim’s prior out of court consistent statements concerning the allegations of sexual assault made to her mother, the investigating officers and others was allowed to go before the jury without instructions. Accused also argued that the trial judge misdirected the jury on the application of the reasonable doubt standard to the issue of credibility.

**Issue:** What legal use can be made of **evidence admitted under the “narrative exception”** to the common law rule that evidence of a W's prior consistent statements is generally not admissible?

**Discussion:**

* Witness cannot be called to prove that another Witness has made a prior statement consistent with the evidence that such other Witness gives at trial, as it is self-serving and has low probative value.
* **Evidence of a prior consistent statement made by a Witness is generally not admissible** as evidence of the consistency of such Witness
* **However, a prior consistent statement can be led for its existence, not for its content, to show consistency of conduct if a limiting instruction is given**
* **Only the existence of the statement can be mentioned, not the content**
* So, the jury were entitled to hear of the fact of the prior complaint as this was part of the narrative:
  + The fact of the complaint was relevant and probative to the narrative and to understanding the chain of events, and if it had been limited to the narrative it would have been admissible.
  + However, it went beyond that.
* There is also a discussion of the ***R. v. W.D.***formula for applying reasonable doubt in the context of a case where credibility is central. It has to be reinforced to the jury that criminal standard of proof requires BARD, and not choosing who the jury believes more.
* **The trial judge erred in failing to instruct the jury on the allowed use of prior consistent out of court statements .**

**Ruling:** Appeal allowed, new trial ordered.

**W.D. Instruction:**

1. If you believe the Accused, then you must acquit;

2. If Accused’s evidence raises a reasonable doubt, then you must acquit;

3. If you reject the Accused evidence, AND the rest of evidence proves his guilt BARD, then you must convict;

# *R. v. Stirling* [2008] SCC *Prior consistent statements can be admitted to disprove allegations of fabricated evidence, but they can be only used to show that the evidence was not fabricated, and not for their content.*

**Facts:** Accused is convicted for negligence causing death. The convictions arose out of a single-vehicle accident in which two of the car's occupants were killed and two others were seriously injured, including Accused. The primary issue before the trial judge was whether the Crown had established that Accused, and not the other survivor of the accident, was driving the vehicle when the crash occurred. All parties agreed that a line of questioning during other survivor’s cross-examination raised the possibility that the survivor had motive to fabricate his testimony. Following a *voir dire*, the judge admitted several prior consistent statements, which served to rebut that suggestion. Accused argued on appeal that although the judge was correct in admitting the prior consistent statements for the purpose of refuting the suggestion of recent fabrication, he erroneously considered them for the truth of their contents.

**Issue:** Is this true?

**Discussion:**

* One of the exceptions to inadmissibility of prior consistent statements is where it was suggested that a W recently fabricated portions of his or her evidence.
* A statement thus admitted has no probative value beyond showing that the W's story did not change as a result of a new motive to fabricate.
* It is impermissible to assume that because a W made the same statement in the past, he was more likely to be telling the truth, and any admitted prior consistent statements were not be assessed for the truth of their contents.
* Prior consistent statements have the impact of removing a potential motive to lie, and the trial judge is entitled to consider removal of this motive when assessing the W's credibility.
* The judge was aware of the limited use of the prior consistent statements, and no error was made.

**Ruling:** Appeal dismissed.

# Challenging the Credibility of Your Own Witness.

## Adverse Witness: A W who give evidence unfavourable or opposed to the interest of the party who called him. This is most common when the W starts to contradict his past testimony.

## Hostile Witness: A W that does not wish to tell the truth because of a motive to harm the party who has called him, or to assist the opposing party.

NOTE: these two are treated the same for the purpose of s.9.

* **A hostile witness can be cross-examined by their party with leave of the court** (According to Paciocco)
* **A party can cross-examine an adverse W if he can be said to be “adverse” in accordance to s.9** of the *Canada Evidence Act.*

# *Canada Evidence Act S.9 Adverse Witnesses [start with 9(2), then 9(1)]*

Adverse witnesses

**9.** (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Previous statements by witness not proved adverse

(2) Where **the party producing a witness** alleges that the witness **made** at other times **a statement in writing, reduced to writing, or recorded on audio tape or video tape** or **otherwise**, ***inconsistent with the witness’ present testimony*, the court *may*, without proof** that the witness is adverse, **grant leave to that party to cross-examine the witness** **as to the statement** and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

R.S., 1985, c. C-5, s. 9; 1994, c. 44, s. 85.

* **A s.9(1) issue arises when a W becomes adverse or hostile to the party leading them**.
* Where the W has been declared adverse under s.9(1), counsel can have a go cross-examining him.
* If found adverse, W can be subjected to general cross-examination
* A s.9(2) issue arises when a W appears to have given a previous inconsistent statement that was recorded and documented.
* Without being labelled adverse, W can be cross-examined on their previous inconsistent statement
* This is different from s.9(1) which makes way for a general cross-examination.
* Cross-examination on the inconsistency of the statement does not does not make the statement admissible:
  + the statement is not being put for its truth
* This is more limited than s.9(1), but may often be a stepping stone to s.9(1), which can be relied on if the limited cross-examination is not sufficient.

# *R. v. Milgaard* [1971] SKCA *Procedure for a s.9(2) application.*

**Facts:** Accused, a young man of 17, is convicted of the non-capital murder of a girl and sentenced to life imprisonment. He had driven in the company of friends from Regina to Saskatoon to pick up a friend on their way to Vancouver when he stopped a girl in the street in Saskatoon to ask his way. Right after that the car got stuck and he and one friend went to look for help. One of the friends went in the same direction of the girl. He went in the opposite direction of the girl and returned about 20 minutes later. The girl was later found dead near the place where the youths had stopped, her body covered with stabbing wounds and showing signs of sexual attack. His friends in the car later signed a statement to the effect that she had seen her companion stabbing the victim. **At trial she claimed to have forgotten such making this statement. The appeal was based, among others, on allowing the cross-examination of W by the Crown counsel in the presence of the jury before any declaration was made as to her being adverse**, **and failure to hold a cross-examination of the same W on a previous written statement in the absence of the jury before making a ruling as to whether she was adverse**.

**Issue:** How and under what procedure a witness can be cross-examined by the counsel which presents them.

**Discussion:**

* Under **s.9(2) judge can grant permission to cross-examine on prior inconsistent statements** without declaring W adverse. This is not an absolute right, and the judge has discretion not to allow this process.
* If after that counsel applies **to call W adverse**, the **cross-examination can be considered as evidence of** adversity (**lack of credibility to testimony**)
* There is **no assumption as to which statement is true** (the prior or the current).
* The **procedure** for this is as follows:
  1. **Counsel has to advise the Court that s.9(2) application is being made**
  2. **Dismiss the jury**
  3. **Explain to the circumstances to the judge and produce the written statement**
  4. **Judge has to determine whether there is in fact inconsistency at hand.**
  5. **Counsel has to prove the written evidence wither by having the W affirm it or by other evidence**
  6. **If the statement is proven, other side can cross-examine**
  7. **Judge has to decide whether or not a cross-examination before the jury will be permitted.**
* After a successful s.9(2) cross-examination, if the W still adverse, counsel may choose to go to a s.9(1) application.
* The judge did err in allowing the cross-examination of a W respecting a statement in writing previously made by that W inconsistent with the evidence given in Court in the jury's presence.
* But, in the present case, there was nothing in the cross-examination of the W either by Crown or defence counsel that would not have occurred if the correct procedure had been applied.

**Ruling:** Appeal dismissed.

**280.6 Statement Evidence**

# *Wawanesa Mutual Insurance v. Hanes* [1963] ONCA *In determining whether a W is adverse, judge may consider prior inconsistent statements of theirs.*

In cases where application is made to introduce a prior inconsistent statement **under s.9(1), the following**

**procedure is to be observed at a *voir dire***:

1. Court must find that the alleged prior statement was made;
2. Prior statement must be substantially important and substantially inconsistent with previous testimony;
3. Court should at this point consider the demeanor and behaviour of the W;
4. Court has to determine if a s.9(1) cross-examination would be in the interest of justice;
5. Based on the above, the Court has to make a finding that W is adverse;

* Such admittance should not be indiscriminate
* It is in the end, up to the jury to decide whether the prior statement has in fact been made by the W.

# *R. v. Cassibo* [1982] ONCA *How to define an adverse witness. (Incest & “My Daughter’s Lies Sent My Husband To Prison.”*

**Facts:** Appellant is convicted on four counts of incest with his daughters. At trial Accused denied the allegations. Defence called Ws, including people living in the house, to testify to the improbability of the acts alleged. Judge found these Ws to have either low credibility, or their testimony being of low value. Victim’s mother (Crown W) testified and changes her story, denying her previous corroborative statements to the police. Crown has her ruled as an adverse witness, and has her prior statements admitted. Accused appeals on the grounds of this being improper.

**Issue:** What is an adverse witness?

**Discussion:**

* There was an issue of corroboration – at the time children and victims of sexual assault required independent corroboration of their testimony (as if they are Vetrovec witnesses). At the case at bar it was ruled that the two girls were able to corroborate each other (notwithstanding the opportunity for collusion). Further, this was not a case of similar fact, but rather their corroboration could be considered direct evidence, since their testimony was that they present during the attack on each other.
* The ***“My Daughter’s Lies Sent My Husband To Prison”*** magazine – is this a key issue or collateral issue?
* If it is a **collateral issue**, **you may cross-examine**, **but you *cannot* later adduce evidence later which contradicts**.
* If it is a **key issue**, **you may cross-examine**, ***and/or* later adduce evidence later which contradicts**.
* At a ***voir dire* victims’ mother corroborated the daughters’ story**, **but at direct examination she changed her statement and denied everything**.
* Trial judge allowed the *voir dire* evidence to be accepted as the trial evidence.
* **Defence at a cross-examination** elicited the contrary statement from the mother that the **daughters had never complained about anything**.
* **Crown applies to re-examine** her regarding the **prior inconsistent statement that she made to the police**.
* **Crown asks** to have her deemed as **Adverse under s.9(2)**. – **fails because it was not written down**.
* **Crown must go to s. 9 (1) (Hostile)**
  1. **Prove the inconsistent statement (police testimony or oral statement)**
  2. **Prove very inconsistent nature**
  3. **Prove hostility via:**
     + **General demeanour**
     + **Lack of a reasonable alternate explanation.**
* **S.9(1) does require a finding of adversity before a prior inconsistent statement is introduced** at a *voir dire.*
* Factors to consider when declaring W adverse:
  + Demeanour and air of hostility towards leading counsel, and towards the other side.
  + Prior inconsistent statements: how radical is the change?
  + Is there any explanation for the chance?
* Court finds that the witness is adverse/hostile and that s. 9 (1) is applicable **– especially since there was no reasonable explanation for the switch in testimony (i.e. now that the girls never said anything), but that there is a reasonable explanation of why she would switch (i.e. pressure from husband/family).**
* Still – **remember that this has to do with credibility, not truth of statement**.

**Ruling:** Appeal dismissed.

# *R. v. McInroy and Rouse* [1978] SCC *If a W pretends to not remember a statement, is it grounds for cross-examination under s.9(2)? (yes)*

**Facts:** Accused’s appeal from convictions of murder. **BCCA held that the trial judge had erred in permitting Crown to cross-examine a Crown W under s.9(1)** in respect of a statement after that W had said that she was unable to remember making such a statement to the police to the effect that Accused had told her he had killed the victim. The majority of the BCCA, went on to hold that W’s statement to the police could properly be placed before the jury under the doctrine described as "past recollection recorded" because she had testified that her statement represented what she believed to be true at the time she gave it even though she said she did not recollect her conversation with Accused at the time of the trial. The majority held that the statement was admissible as probative of the matter asserted in it.

The **SCC found that in fact the correct approach was under s. 9(2) and that is was sufficiently met**.

**Issue:** Can the statement be admitted?

**Discussion:**

* Trial judge determines that W is “feigning” not remembering.
* SCC says that it therefore meets the 9 (2) requirement. (Inconsistency exists, no need to go further to adversity.)
* But… BCCA analyzes under 9 (1) – and says the threshold has not been met… because it does not “hurt” (actually become “negative” to the side which presented it)… it is simply brought to “zero.”
* S.9(2) conferred a discretion on a trial judge where the party producing W alleged that W had made, at another time, a written statement inconsistent with the evidence being given at the trial.
* The discretion was to permit, without proof that the W was adverse, cross-examination as to the statement.
* Where the judge finds there is a legitimate loss of memory, there may not be an inconsistency found and thus no s. 9(2) granted.
* However, Where the trial judge in the *voir dire* comes to the conclusion that the lack of memory is feigned or fake, there is an actual conflict in the testimony cross-examination under s.9(2) can be called.
* The task of the trial judge was to determine whether the W’s testimony was inconsistent with her statement to the police. He was perfectly entitled to conclude that it was.

**Ruling:** Appeal dismissed

# Hearsay

## Hearsay: An out-of-court statement that is admitted/offered for its truth.

The essential defining features of hearsay are:

1. The fact that an out-of-court statement is adduced to prove the truth of its contents and
2. The absence of a contemporaneous opportunity to cross-examine the declarant.

An out-of-court statement includes previous statements made by a witness who testifies. An out-of-court statement also includes an “implied statement,” which is any assertion revealed through actions and not words. Where the actions are intended to communicate a message, they are treated the same as a verbal or a written statement.

**Hearsay evidence is presumptively inadmissible** (***Khelawon***) **because**:

* It is not a statement provided under oath;
* It takes away the perceptive abilities that a trier of fact usually has – such as the ability to assess the demeanour of the person making the statement, their inflections, body language, tone, etc.;
* Most importantly, the evidence is not subject to cross examination
* The rule against hearsay is intended to enhance the accuracy of the court’s findings of fact, not impede its truth seeking function (***Khelawon***)
* The fact that W testifies in court does not matter. The prior statement is still hearsay and for it to be admitted for its truth, a hearsay exception needs to be found. See s.9

**There used to be exceptions to the common law hearsay rules – but ultimately the Courts decided this was too inflexible… the basic principle is…**

**“Statements made in certain circumstances where we might trust them to be truthful.”**

* Declarations made upon reasonable expectation of imminent death (“…it was Johnny Two‑Lunches… ghhaagghh…”)
* *Res Gestae* - Spontaneous declarations proximate with some sudden event. (i.e. person running out of a burning house… then “ahhhhh…kitchen… grease… french fries… ahhhh…oh my god!”)
* Statement of Intent – (i.e. tell a friend “I’m meeting some guy from POF at the new Earls restaurant at 9:00.”)

# Non-Hearsay Uses of Out of Court Statements

* When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay, and it is admissible as long as it has some probative value.
* ***R. v. Edwards***[1994] ONCA concluded that the intercepted telephone calls were not hearsay and were admissible.

***R. v. Subramaniam* [1956] JCPC** Out of court statements that are not adduced for reasons other than the truth of their content are not necessarily hearsay.

**Facts:** Accused was charged with possession of twenty rounds of ammunition, an act that was contrary to an emergency decree to counter terrorism then in place in Malaysia. He was found wounded by security forces, was searched, and the ammunition discovered. Accused’s defence was duress, and he took the stand. He described how he was captured by terrorists and was about to relate conversations with them. The trial judge interjected to rule that what the terrorists said was hearsay — unless the terrorists were called to testify. Of course, the terrorists were not called. Accused was convicted and sentenced to death.

**Issue:** Can Accused lead evidence of what the terrorists told him?

**Discussion:**

* Privy Council allowed his appeal on the grounds that the trial judge had erred in preventing Accused from telling the court what the terrorists had said.
* Accused’s defence of duress would be made out if he had been compelled to do the acts by threats that gave rise to a reasonable apprehension of instant death.
* Of importance in the law of duress is the fact that threats are made.
* It is not hearsay and is admissible when it is proposed to establish by the evidence the fact that the statement was made, not the truth of the statement.
* In this case, it was of no significance whether the terrorists would have acted on their threats. The relevancy of these statements had nothing to do with their being true.

**Ruling:** Appeal allowed

**280.7 Hearsay**

# Circumstantial Evidence of State of Mind

# *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42 Out of court statements are not hearsay if they show the state of mind of the declarant.

**Facts:** The accused, G and H, were charged with first degree murder following the shooting death of P.  The identity of the killer was the sole issue at trial.  P’s girlfriend was the only witness who provided direct evidence on this issue and she identified G as the shooter.  P and both accused were all heavily involved in the drug trade.  The Crown’s theory was that the shooting was retribution for P’s failure to repay a large drug‑related debt, and that G was the shooter while H acted as the lookout.  Circumstantial evidence formed the core of the case against G, and the entirety of that against H.  The Crown led evidence that P was driven into hiding and was fearful for his safety in the weeks preceding his death, and that G was on a relentless search for P.

**P’s girlfriend testified that shortly before his death, P said to her, “If anything happens to me it’s your cousin’s family.”  She understood that P was referring to G, and that he was afraid.**  Acknowledging the need for an appropriate limiting instruction, the trial judge ruled that the statement was admissible to show the state of mind of P and to rebut the defence proposition that others would have had a motive to kill P at the beginning of 2003.

**Issue:** Is this hearsay?

**Discussion:**

* In his charge to the jury on the burden of proof, the trial judge correctly instructed the jury that, in order to base a verdict of guilt on circumstantial evidence, they had to be convinced beyond a reasonable doubt that the guilt of the accused was the only reasonable inference that could be drawn.
* However, he also stated that the accused was entitled to an acquittal if the jury found that there was an “equally rational inference” that did not point to guilt, and added that “[i]f there is a second inference that’s as reasonable, you will not be able to base a verdict of guilt on circumstantial evidence.”
* Following a question from the jury on whether reasonable doubt can be based upon feelings and intuitions, the trial judge repeated his previous instructions, including the ambiguous “equally rational inference” language.
* He added: “Whether you find there is a reasonable doubt, or whether you find there is not a reasonable doubt, you should individually be in a position to be able to explain your position.”
* Defence counsel objected to the use of the “equally rational inference” terminology, arguing that it could suggest to the jury that a burden of proof rested on the accused. The trial judge recalled the jury and gave a clarification using the correct language.
* **In providing a limiting instruction to the jury in respect of P’s statement of fear of G**, **the trial judge told the jury the remark could be used to determine the state of mind of P shortly before his death, and to eliminate other potential people who would want to do P harm, as far as P was concerned**.
* **The jury found G guilty** as charged and H guilty of the included offence of manslaughter.
* The majority of the **Court of Appeal set aside the convictions and ordered a new trial** on the basis of the trial judge’s errors in his instructions on the burden of proof, and in **the limiting instruction given in respect of P’s statement of fear of G**.
* There is **no reason to disturb the trial judge’s ruling on the admissibility of the deceased’s statement** made to his girlfriend shortly before his death.
* **That statement was tendered and admitted for the truth of the fact that P himself feared G**, a purpose that does not exceed the scope of the traditional “state of mind” exception to the hearsay rule.
* **Declarations of present state of mind are admissible where the declarant’s state of mind is relevant and *the statement is made in a natural manner and not under circumstances of suspicion***.
* In the present case, there was no argument that the statement was made under circumstances of suspicion.
* **P’s fear of G was a relevant fact because P’s fearful state of mind was probative of the nature of the relationship between he and G in the time period preceding the murder**.
* Such information **may afford evidence of the accused’s animus or intention to act against the victim, making it relevant to motive and, in turn, to the issue of identification**.
* It was **important for the jury to know that P went into hiding and feared for his safety** in the weeks preceding his death **because of his fear of G, and not because of his fear of someone else**, as the defence suggested.
* The trial judge found that the statement’s probative value outweighed its possible prejudicial effect and admitted the statement into evidence.  His decision accorded with the applicable legal principles, and as such, it is entitled to deference.
* **The trial judge properly instructed the jury not to use P’s statement for the prohibited purpose of proving G’s state of mind, or to conclude that G in fact intended to harm P**.
* **He correctly explained that the sole permissible use the jury could make of the statement was as proof of P’s state of mind shortly before his death**.
* **He also clearly qualified his assertion that the statement could be used to eliminate other potential people who would want to do P harm with the phrase “as far as P was concerned”**.
* **This instruction accurately set out** the very purpose for which the statement was tendered:  **to demonstrate that as far as P was concerned — in his state of mind — G was the only person with cause to do him harm.**

**Ruling:** *Held* (LeBel and Fish JJ. dissenting):  The appeals should be allowed and the convictions restored.

# *R. v. Ratten* [1971] JCPC *Out of court statements are not hearsay if they show the state of mind of the declarant and have probative value for the trial.* Hearsay only arises when words are relied on to establish some fact

**Facts:** Accused is convicted of the murder of his wife. Accused alleges that he shot her accidentally while cleaning his gun. There was a phone call made out of the house at the time of the death. According to the operator, the wife was hysterical and sobbing, trying to phone the police. She then hung up.

**Issue:** Is this hearsay?

**Discussion:**

* The mere fact that evidence of a witness contains words spoken by another person does not make it hearsay.
* **Hearsay only arises when these words are relied on to establish some fact**
* The fact that a call was made, and that the caller was hysterical establishes the fact that she was in a state of fear.
* This is admissible evidence of the state of mind.
* This has probative value, as it adds weight to the theory that the shot was not accidental.

**Ruling:** Appeal dismissed.

# Exception to the Hearsay Rule: Principled Approach

The law has come to recognize that **the traditional hearsay exceptions were driven by two fundamental principles:**

1. **Necessity.**
2. **Reliability.**

This was originally set out in ***R. v. Khan***and ***R. v. Smith***.

***R. v. Khan*** [1990] 2 S.C.R. 531 Establishes the rules of Hearsay and the use of children as witnesses in court. ***The Court developed the “principled approach” to hearsay***

In this case, and subsequently in [*R. v. Smith (1992)*](http://en.wikipedia.org/wiki/R._v._Smith_%281992%29), [*R. v. B.(K.G.) (1993)*](http://en.wikipedia.org/w/index.php?title=R._v._B.%28K.G.%29_%281993%29&action=edit&redlink=1), [*R. v. U.(F.J.) (1995)*](http://en.wikipedia.org/w/index.php?title=R._v._U.%28F.J.%29_%281995%29&action=edit&redlink=1), [*R. v. Starr (2000)*](http://en.wikipedia.org/w/index.php?title=R._v._Starr_%282000%29&action=edit&redlink=1), and finally, [*R. v. Khelawon (2006)*](http://en.wikipedia.org/w/index.php?title=R._v._Khelawon_%282006%29&action=edit&redlink=1), the Court developed the “principled approach” to hearsay, where hearsay statements can be admitted if they are sufficiently reliable and necessary.

At trial, the judge held that the child was not [competent](http://en.wikipedia.org/wiki/Competence_%28law%29) to give unsworn testimony and that he would not admit the statements made by the child to her mother about the assault as it was hearsay and could not fall into the “spontaneous declaration” exception as it was not contemporaneous. On the basis of this finding, Khan was acquitted.

On appeal, the Court of Appeal found that the trial judge had been too strict in the consideration of both testimony and the hearsay. The acquittal was overturned and a new trial ordered.

**ISSUES**:

1. Did the Court of Appeal err in concluding that the trial judge misdirected himself in ruling that the child witness was incompetent to give unsworn testimony?
2. Did the Court of Appeal err in holding, contrary to the ruling of the trial judge, that a "spontaneous declaration" allegedly made by the child to her mother after the alleged sexual assault was admissible?

**DISCUSSION:**

* McLachlin, writing for a unanimous Court, held that the **child was competent to testify and the statements should be admitted**.
* Section 16 of the [Canada Evidence Act](http://en.wikipedia.org/wiki/Canada_Evidence_Act) that gave the conditions under which a child can testify.
* The **trial judge was wrong in finding that since the child did not understand what it meant to tell a lie in court that she could not give testimon**y.
* For a child to testify under section 16, the judge must only determine if the witness has sufficient intelligence and an understanding of the duty to tell the truth.
* Both criteria were satisfied but inevitably placed too much emphasis on the child’s age.
* Leniency must be given to child testimony otherwise offences against children could never be prosecuted.
* The judge correctly applied the test for spontaneous declarations. To admit the statement as a "spontaneous declaration" would be to deform the exception beyond recognition. However, rather than have the issue disposed at this juncture, McLachlin went down a different route, changing the course of hearsay law for years to follow. She held that a **“principled approach”** must be taken to hearsay statements: **if the statement was reliable and necessary it should be admitted**.
* The **child, having aged considerably** since the events, was unable to remember what happened, thus **making the statement necessary**.
* The statement was deemed **reliable for a number of reasons**:
  + T **should not have had an awareness of the type of acts** that had taken place at her young age
  + She **made the statement without any prompting** from her mother
  + She was **disinterested in the litigation**
  + She had **no reason to lie** to her mother and was not aware of the implications of what had happened to her.
  + T's statement was **corroborated by the semen found on her sleeve**.

# *R. v. Starr* [2000] 2 S.C.R. 144 Re-evaluated several principles of evidence. In particular, they held that the "principled approach" [hearsay evidence](http://en.wikipedia.org/wiki/Hearsay) under [*R. v. Khan*](http://en.wikipedia.org/wiki/R._v._Khan) and [*R. v. Smith (1992)*](http://en.wikipedia.org/wiki/R._v._Smith_%281992%29) can be equally used to *exclude* otherwise inclusive hearsay evidence.

# *R. v. B. (K.G.)* [1993] SCC *Evidence of prior inconsistent statements of W other than Accused should be admitted on a principled basis, the governing principles being the reliability and necessity of the evidence.*

**Facts:** In the course of a fight between four young persons (including Accused) and two men, one of the youths stabbed one of the men in the chest, killing him. Two weeks later, Accused’s friends were interviewed separately by police. Police advised them that they were under no obligation to answer questions and that they were not charged with any offence "at this time." With the youths' consent, **the interviews were videotaped**. They told police that Accused had acknowledged that he thought he had killed the victim with a knife. Accused was subsequently charged with second degree murder and tried in Youth Court. At trial, the three youths who had given statements to police recanted their statements and, during cross-examination under s.9, they stated that they had lied to police to exculpate themselves from possible involvement. Although the trial judge had no doubt that the recantations were false, the prior inconsistent statements could not be tendered as proof that Accused had actually made the admissions, but only to impeach the credibility of the witnesses. Accused was acquitted because there was no other sufficient identification evidence. The ONCA upheld the acquittal.

**Issue: Should the common law rules of hearsay be reconsidered?**

**Discussion:**

* **The rule should be replaced with a principled approach** based on **reliability** and **necessity**.
* As a threshold matter the statements should only be admissible if they would have been admissible as the W’s sole testimony.
* **If a witness rejects their prior statement and/or radically changes their testimony at trial this may satisfy the necessity requirement to bring the prior statement in through hearsay evidence**.
* **Reliability would be satisfied when the circumstances in which the prior statement was made are reasonably analogous to those in court**. The closer these come to the courtroom setting, the more reliable they are.
* This is a cumulative analysis. This requires:
  1. Courtroom **Oath**: If the statement was made under oath, solemn affirmation or declaration following an explicit warning to the W as to the existence of severe consequences for perjury;
  2. **Physical Presence**: Something that would allow the court to observe the behaviour and demeanour of the declarant. If the statement was videotaped in its entirety, this is the best case scenario;
  3. **Contemporaneous Cross-Examination**: The opposing party had had a full opportunity to cross-examine W at trial respecting the statement.

## WHAT ARE THE ADEQUATE SUBSITUTIONS FOR Oath, Physical Presence, Cross-Examination?

* Alternatively, other requirements might suffice if the judge was satisfied that the circumstances provided adequate assurances of reliability
* **If the requirements were satisfied**, the trial judge would instruct **the jury** that they **could take the statement as substantive evidence** of its content.
* Where the prior inconsistent statement did not have the necessary reliability, but the party leading them otherwise satisfied the requirements of ss.9(1) or 9(2), the statement might still be tendered into evidence, but the trial judge had to instruct the jury in terms of the existing rule.
* Some things to consider here:
  1. motive to lie
  2. temporal proximity of the statement
  3. form of the statement

**Ruling:** Appeal allowed and new trial ordered.

# *R. v. U.(F.J.)* [1995] SCC *Similar out of court statements can be compared with each other to establish reliability.*

**Facts: Accused** was convicted of **incest and sexual touching**. In an interview by an investigating officer, the **victim** (Accused’s 13 year old daughter) **stated that he had had regular sexual intercourse with her**, most recently the previous night, and described various sexual activities. **Accused** was questioned and **admitted to the incidents**, described the same activities and also stated that the most recent incident was the previous night. Accused was then charged with a number of sexualoffences. **At trial**, his **statement** to police was **admitted** **through** the **testimony of the interviewing officers**. When the **daughter was called by Crown**, she admitted that she had made the statement alleged, but asserted that **the allegations of sexual assault were untrue**. **Accused** also testified at trial and **denied the truth of much of the contents of his statements**. The ONCA upheld the trial conviction.

**Issue: Did the judge err in inviting the jury to compare the daughter’s unadopted prior inconsistent statement with Accused’s unadopted statement?**

**Discussion:**

* The **prior statement was necessary** evidence **when a W recanted**.
* Where W was available for cross-examination, a threshold of **reliability** could sometimes be established **by a striking similarity between two prior statements** (the one being assessed and the other clearly substantively admissible), if there were, **on a BoP**, striking similarities and **neither reason nor opportunity for collusion** of the declarants, **nor improper influence** by third parties.
* If the statement of recanting Accused met the reliability criterion and was substantively admissible, the trier of fact was directed to follow a **two-step process of evaluation**:
  1. Ascertain that the statement being used as a reliability reference was made, without considering the prior inconsistent statement under consideration;
  2. **Compare the similarities of the statements**, and if sufficiently striking and unlikely to have been fabricated, draw conclusions from that comparison about the truth of the statements.
* Here, the victim provided a comprehensive explanation for changing her story.
* **Victim and Accused’s statements contained a significant number of similar details with a strikingly similar assertion as to time of sexual contact**.
* **No evidence of collusion or pressure**.
* Therefore, the complainant's **statement was** substantively **admissible**.

**Ruling:** Appeal dismissed

# *R. v. Parrott* [2001] SCC *If W can testify in court, then bringing in hearsay is not necessary.*

**Facts:** Accused was convicted of **kidnapping and sexual assault on a mentally challenged woman**, on the basis of out-ofcourt statements made by the complainant to her doctor and the police, some of which had been videotaped. The complainant did not testify on the *voir dire* or at trial. The Court of Appeal held that the trial judge erred in **admitting the hearsay evidence when the victim herself was available to testify** and there was no expert suggestion that she would suffer any trauma or adverse effect by appearing in court. Crown appealed to the SCC

**Issue: Can past statements be admitted in place of having the W testify?**

**Discussion:**

* The **trial judge erred in finding its admission to be "necessary".**
* If W is physically available and there is no suggestion that she would suffer trauma by attempting to give evidence, as was the case here, that evidence should generally not be replaced by hearsay.
* There were **no exceptional circumstances in this case to displace the general rule**.

**Ruling:** Appeal dismissed.

# *R. v. Pelletier* [1999] BCCA *If W is disinclined to testify, adverse, or unlikely to cooperate, this does not pass the threshold of necessity. (MUST make reasonable efforts to get W into Court)*

**Facts:** Accused appeals from his conviction on a charge of first degree murder. The Crown's theory was that Accused had been conscripted by a drug dealer, Kong, to murder Ward because Ward owed Kong money and was believed by Kong to be an informant. At trial, the **Crown sought to adduce evidence of a conversation between Cole and Kong in which Kong allegedly asked Cole whether he thought Ward was an informant**. The Crown sought to ask Cole about statements made by Kong as an exception to the rule against hearsay. **The Crown claimed that this evidence was necessary because the investigating officers had determined that Kong was unwilling to cooperate with the authorities.**  The trial judge found that Cole’s evidence was admissible because the tests of necessity and reliability had been met. Accused argued that the Crown should have been required, at a minimum, to call the officers to testify under oath as to the basis for their belief that Kong would neither allow himself to be interviewed nor appear as a Witness.

**Issue: Did the evidence pass the threshold of necessity?**

**Discussion:**

* The officers ***belief* that Kong would be unwilling to testify did not mean that it was necessary to lead hearsay evidence**.
* It was only necessary to call this evidence because Kong was adverse to the Crown.
* The evidence of those who were simply disinclined to testify or unlikely to cooperate was not included within the ambit of necessity.
* The **Crown** had therefore ***failed* to establish *necessity***, and the **evidence was *not admissible******as an exception to the rule against hearsay***.

**Ruling:** Appeal allowed, new trial ordered.

# *R. v. Khelawon* [2006] SCC *When accessing reliability of the statement, the court can also consider the inherent trustworthiness of it.*

**Facts:** Appeal by the Crown from ONCA decision overturning the Accused’s convictions for assault of all sorts. Accused was the manager of a retirement home. An employee of the retirement home discovered S, a resident of the home, badly injured in his room. **S told the employee that Accused had beaten him and threatened to kill him if he did not leave the home**. The employee eventually took S to a doctor, who testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. **The employee took S to the police and S gave a videotaped statement**. The **statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth** and that he could be charged if he did not tell the truth. The police attended at the retirement home where **more residents complained that they had been assaulted by Accused**. **Accused was charged** in respect of five victims but, by the time of trial, **four of them, including S, had kicked the bucket and the fifth went senile**. The trial judge admitted some of the hearsay evidence based in large part on the similarity between the statements. ONCA excluded all of the hearsay statements and acquitted Accused on all charges.

**Issue: Should the complainants' hearsay testimony should be received in evidence**.

**Discussion:**

* **S's videotaped statement** to the police was **inadmissible**.
* His **death** before the trial = **necessary**, **but** the statement was **not sufficiently reliable**.
* The circumstances in which it came about did not provide reasonable assurances of inherent reliability.
* **Serious issues as to** the inherent reliability of the statement included **whether S was mentally competent**, whether he understood the consequences of making the statement, whether his statement was motivated by dissatisfaction about the management of the home, and whether his injuries were caused by a fall.
* There was a striking similarity between statements, but the **other statements posed even greater reliability difficulties** and could not be admitted to assist in assessing the reliability of S's.
* The traditional law of **hearsay** **applies** to out of court statements made by the W who does testify in court when that **out of court statement is tendered to prove the truth of its contents**.
* W who testifies in court is under oath, can be observed by the trier of fact and is available for cross-examination.
* **There are two frameworks for reliability that can be followed**:
  1. The ***B. (K.G.)***Framework
  2. **Inherent trustworthiness** Framework
     + Does the statement flow naturally, does it make sense, air of reality, was it relatively contemporaneous, spontaneous, etc?
     + Did the maker of the statement have a motive to lie?
     + Is there any corroborative evidence for the content of the statement?
* **Two frameworks can be used alternatively or together, but using both will increase the reliability of the statement**.

**Ruling:** Appeal dismissed

## Hearsay - Principled Approach Test:

1. **Hearsay is presumptively inadmissible**. **Start here. (R. v. B.K.G.)**
2. **Is the** content of the **statement *regularly admissible*? (R. v. B.K.G.)**
3. Can the party leading the evidence establish on BoP that the statement is **not a product of coercion, threats, duress, etc**. – ***especially make sure not State coercion, threats, etc*.** (There is also a heightened caution for recanting Ws) **(R. v. B.K.G.) (RARE!!)**
4. Can the party leading the evidence establish **on BoP** that **admitting the statement must be** **necessary**
   * 1. It must be necessary to **discovering the truth**
     2. it must be necessary insofar as enabling all **relevant and reliable information** to be placed before the court
     3. **Inability of a W to testify** in court (**reasonable efforts to locate, etc.)**
     4. **W radically changing their story** and washing their hands of their previous testimony
5. Can the party leading the evidence establish **on BoP** that the statement must be **reliable**.
   1. ***B. (K.G.)***test asks for closest fit to the tree indicia of courtroom testimony
      1. **Oath** (or in awareness of potential liability)
      2. **Physical presence** (to allow observation of the demeanour of declarant)
      3. Ability for contemporaneous **cross-examination**
   2. **Similar out of court statements can be compared with each other to infer reliability** (***R. v. U.(F.J.)***)
   3. If the ***B.* (*K.G.)*****requirements are not met, consider inherent trustworthiness** (***R. v. Khelawan***):
      1. Does the content carry with it such **strong indications of truth that we think it meets threshold reliability** and can go to jury (***R. v. Khan***)
      2. Is there a **motive for the W to lie**?
      3. Is there any **corroborative evidence to support the truthfulness**?
   4. The **two tests can be complimentary** in establishing the balance to pass the threshold **of reliability**.
6. The **P/P balance must be satisfied**.

# Business Records and Statements in the Course of Business

## Common Law Test for Business Records:

1. Document **must be an original entry** (can be done through a mechanical process, not person);
2. It must be made **contemporaneously**;
3. It must be made in the **routine of business** (broadly interpreted);
4. Document must be **made by recorder with personal knowledge** of the thing as a result of having done or observed formulated it;
5. The **recorder** must have had a **duty to make the record**;
6. The **recorder** must have had **no motive to misrepresent**.

**280.7 Hearsay**

# *Canada Evidence Act s.30 Business Records to be Admitted into Evidence*

*(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a* ***record made in the usual and ordinary course of business*** *that contains information in respect of that matter* ***is admissible*** *in evidence under this section in the legal proceeding on production of the record.*

(2) *One* ***can draw on document for truth of contents and to draw inferences from things that are missing*** *from the document;*

*(10) (a)* ***records made in course of investigation or inquiry or in giving legal advice*** *and (b) documents that are* ***against public policy****,* ***do not follow under this rule***

*(11)* ***Statute does not derogate from common law rules, but is in addition to them****. One* ***can use common law or the statutory rules, depending on the circumstances****.*

# *R. v. Wilcox* [2001] NSCA *Choice between common law records test and the s.30 test. Start with s. 30 of C.E.A., but if s. 30 fails can still go to Common Law Necessity/Reliability tests, or vice-versa.*

**Facts:** The Accused were fishermen and a wholesaler, Glace Bay Fisheries. They were charged with hundreds of summary conviction offences under the *Fisheries Act.* The fishermen were alleged to have sold snow crab catches in excess of their quotas to GB. **The Crown seized** a substantial amount of financial records from GB pursuant to the *Act*, included a “**crab book**”. The book was **prepared by an employee** of GB. He was **not required by his employer to prepare this record**. He kept it on his own initiative to properly fulfill his duties, although **against his employers’ orders**. The book contained a record of the shipments received from fishermen and the payments that were made. He had **no independent recollection of these transactions apart from the book**. It was **for these reasons that the judge refused to admit it**.

**Issue: Can this be admitted for the truth of its contents?**

**Discussion:**

* The judge erred when he excluded the book.
* The court could not evaluate the evidence that Accused claimed should have been excluded since there were no findings of fact.
* The **book was not admissible under the common law** business records exception to the hearsay rule, **because the employee had *no duty* to create this record**.
* However, the book was admissible pursuant to s.30 of the Canada Evidence Act.
  + **Kimm made it during his employment in the usual and ordinary course of business**. (or did he!?)
  + **s.30 has no “duty” requirement**.
* It was immaterial that Kimm created it against GB’s instructions since he used it to fulfil his duties.
* The seizure was properly conducted under the Act.
* Although the crab book could be said to have been ***made in the “ordinary course of business”***, court was not prepared to admit it under s.30.
  + **Judge felt that in so doing the ambit of the section would be extended too broadly and he preferred to apply the principled approach**.
* Ultimately he found that the crab book had sufficient guarantees of trustworthiness to be admitted.
* The **book should have been admitted since it *satisfied the requirements of reliability and necessity***.

**Ruling:** Trial continued.

# Declarations Made Contrary to Interest

## Common Law Declarations Against (Liberty) Interest Test:

A declaration against pecuniary or proprietary interest may be admitted where

1. The **declarant is unavailable** to testify;
2. The **statement** when **made was against the declarant’s interest**;
3. The declarant had **personal knowledge of the facts** stated.

* **Necessity** flows from the **unavailability** of the declarant.
* **Reliability** is founded on the fact that the declarant, who is **aware of adverse facts, admits them**. The **clearest case of this is the acknowledgment of a debt owed**.
* The theory on which the rule rests is that a person will not concede even to himself the existence of a fact which will cause him substantial harm, unless he believes that the fact does exist.

**280.7 Hearsay**

# *R. v. Underwood* [2002] ABCA *Statements against penal interest may be admitted, if it passes specific criteria and the principled analysis.*

**Facts: Accused** was involved in the drug trade and was **charged with the murder of one of his associates**. At his trial he sought to lead evidence that **another of his associates, P, now dead, had confessed to the killing**. **Another associate would testify that P had confessed** to the killing. **P’s wife also has some testimony that points to P’s involvement** in the murder. The **trial judge** found that the **statements were equivocal and did not meet the test of reliability**.

**Issue:** Can these statements be admitted?

**Discussion:**

* Can the statements of P be admitted as declarations against interest?
* The courts have been reluctant in admitting statements against penal interest. But this should be reviewed.
* The court should admit statements against penal interest as not hearsay under **three criteria:**
  + At the time of the **declaration** it **was** **against the declarant penal interests**;
  + It was made in circumstances where the declarant should have ***known* it is against penal interest**;
  + The **potential for penal consequences was not too remote**.
* **Meeting this common law test is good, but not determinative**.
* **After meeting** the common law test, the evidence **still has to pass the principled analysis test**.
* ***Seaboyer***note: (application for **DEFENSE** to lead hearsay evidence **= broader parameters to lead evidence**… but… it is still more limited in the case of ***hearsay*** evidence.)
  + A number of cases have said that there is somewhat greater discretion for Accused to lead hearsay evidence; this case emphasizes that Crown should not oppose hearsay in this situation because it is their job to get a truth not win.
  + **Accused is more likely to succeed leading hearsay evidence, but must still meet some threshold of reliability**.
* The **statements were relevant**.
* The two **statements by P that were hearsay were declarations against penal interest. They also satisfied the test of necessity and reliability under the principled approach**.
* The P/P balance was rockin’

**Ruling:** Appeal allowed, new trial ordered.

# Oral History in Aboriginal Title Cases

# *Mitchell v. Canada* [2001] SCC *Oral histories are admissible as evidence where they are both useful and reasonably reliable (Common Law approach allows for expansions in exceptions to hearsay rules)*

**Facts:** Challenge to customs because of historic aboriginal trading relationship with American aboriginal nations. In 1988, Grand Chief Michael Mitchell, a [Mohawk](http://en.wikipedia.org/wiki/Mohawk_nation) of Akwesasne, attempted to bring goods from the US into Canada. At the border he declared everything that he had purchased in the US but refused to pay any duty on it, claiming that he had an aboriginal right to bring goods across the border.

At trial, the Federal Court agreed with Mitchell and held that there was an aboriginal right to import goods. The decision was upheld by the Federal Court of Appeal.

**Issue: Is aboriginal oral history hearsay?**

**Discussion:**

* Rules of evidence are to be applied flexibly, purposively and to facilitate justice, not stand in its way: rigid application of the traditional rules of evidence may actually injure the search for the truth.
* Go back to the core rationales underpinning the rules of evidence: **search for truth and fairness**
* Oral history will in many respects be the best evidence from aboriginal people; this requires a certain degree of flexibility in adjusting the rules of evidence
* The **basic rule is: oral histories are admissible as evidence where they are both useful and reasonably reliable**
* **Usefulness**:
  1. no other means of obtaining the same evidence
  2. provide the aboriginal perspective on the right claimed
* **Reliability**: the **witness’ particular ability to know and testify to orally** transmitted traditions **may go to admissibility and weight**
* Even useful and reasonably reliable evidence may be excluded in the discretion of the court if its probative value is overshadowed but its potential for prejudice
* **(*Van der Peet*)**test for establishing and aboriginal right protected under the Charter s.35(1)
  1. The existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;
  2. The practice, custom, or tradition was integral to the claimant’s pre-contact society in the sense that it marked it as distinctive; and
  3. Reasonable continuity between pre-contact practice and the contemporary claim

**Ruling: Ultimately** the Supreme Court overturned the decision, and held that Mitchell was required to pay duty for all of the goods he imported, since **he was unable to present enough evidence showing that the importation was an integral part of the band's distinctive culture**.

# Framework for Considering Common Law Exceptions and Modern Approach

# *R. v. Mapara* 2005 SCC 23 (at para. 15) – exceptions to the hearsay exceptions

15 The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following **framework** emerges **for considering the admissibility of hearsay evidence:**

(a) **Hearsay** evidence **is presumptively inadmissible** unless it falls under an exception to the hearsay rule. The **traditional exceptions to the hearsay rule remain presumptively in place**.

(b) A **hearsay exception can be challenged** to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In “***rare cases***”, **evidence falling within an existing exception may be excluded** because the **indicia of necessity and reliability are lacking** in the particular circumstances of the case.

(d) **If hearsay evidence does not fall under a hearsay exception, it may still be admitted** if **indicia of reliability and necessity** are established on a *voir dire*.

(See generally D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 95-96.)

Unless there is good reason to modify an established common law rule, the modern approach to hearsay should be applied in a manner which preserves and reinforces the integrity of the traditional rules of evidence (*Couture*)

# Traditional Exceptions To Hearsay Rules are:

1. Past recollection recorder
2. Statements contributing to the narrative
3. Business Records and Statements in the Course of Business
4. *Res gestae* (A sudden statement intrinsically tied to an event )
   1. A close contemporaneity is required
   2. It is thought reliable as there is little time for calculated insincerity;
5. Dying declaration
   1. The deceased had a settled, hopeless expectation of almost immediate death;
   2. The statement was about the circumstances of the death;
   3. The statement would have been admissible if the deceased had been able to testify; and
   4. The offence involved is the homicide of the deceased.
6. Present statement of future intention
   1. A present statement of future intent without any circumstances of suspicion
   2. If someone states that they are currently expecting to do something at a certain point, you can believe the truth of that person’s statement that they did indeed follow through
7. Declarations Against Interest
8. Co-conspirators’ Exception
   1. The confession of one co-Accused is not admissible against the other co-Accused.
   2. If the participants are tried separately the above rule does not apply.
   3. But this is different for partnerships - all offences that include a common design. Once a partnership is proven by independent evidence to exist, the admission of one partner acting in the scope of the partnership is evidence against all the partners.
   4. Only those statements made during the course of the conspiracy and in furtherance of the conspiracy fall within the exception.
   5. Any statements after the fact of the conspiracy: guilty pleas, full confessions, etc. are not admissible.
9. Oral Evidence in the Aboriginal Context
10. Spousal Exception

# Admissions

## Admissions: Acts or words of a party offered as evidence against that party. These circumvent the hearsay rule.

TWO types of admissions:

1. **Formal admissions:**
   1. Both sides can agree that **matters are conclusively proven** (**jury is instructed as such**) and therefore **will not have to be litigated**.
   2. Admissions **save court time**, (to avoid “mega-trials” and to keep judges happy – to ask for favors later… such as applications for adjournments for new research, etc.).
   3. Can be used **strategically to pre-empt harmful evidence**.
   4. **Once** a fact is **admitted**, it **cannot be taken** back, but **there is *some* judicial discretion to overturn** this.
   5. Counsel **needs specific client instructions to make admissions**.
   6. **Judge cannot order admissions. (*R. v. Castellani*)**
   7. **Crown can *still* call evidence** on a point if the Accused admits it.
2. **Informal admissions: out of court statements of a party.**
   1. Out of court admissions of a party in the action are presumptively an exception to the hearsay rule, because of the ability of the party to deal directly with the evidence.
   2. This idea is conceptually related to the statement against interest idea of hearsay exception

# *Criminal Code 655 Admissions at Trial*

*Where an Accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.*

# *R. v. Castellani* [1960] SCC *Accused can only make admissions on the points introduced by the Crown in their allegations.*

**Facts:** Accused’s wife is poisoned with arsenic, and he is convicted for murder. He appeals on the ground that he was not allowed to admit at trial certain facts under s.562 of the Code.

**Issue:** Are admissions admissible?

**Discussion:**

* Trial judge claimed that defence has no right to make admissions unless Crown is willing to accept it.
* CA disagrees. The judge erred in not admitting this, but the error was not substantial enough to cause prejudice and to warrant a new trial.
* SCC disagrees:
  + **It is up for the Crown to state the allegations and facts against the Accused** of which it seeks admission.
  + **Accused is under no obligation to admit** any of this.
  + But **Accused cannot frame the wording of the allegation by admitting it in his way to suit his own purpose.**
* In the good old days, admissions were inadmissible in court.

**Ruling:** Appeal dismissed.

# Confessions/Informal Admissions

## Confessions: Detailed informal information given by the Accused that go a long way in concluding their guilt, making or breaking the case.

**Probative Value**

Generally, something Accused is alleged to have said about themselves is considered to have high probative value, and therefore is likely admissible as evidence.

* **Questionable circumstances which give rise to issues of reliability and credibility go to *weight* and not *admissibility*** and will usually be dealt with via instructions to the jury.
* One major **exception** to the rule is statements that were **partially overheard**.

# *R. v Palma* [2000] OSCJ *Admissibility of Admissions*

*The Admissions Doctrine*

The rationale for **admitting admissions has a different basis than other exceptions to the hearsay rule**. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, **it is sufficient that the evidence is tendered against a party**. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, “[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath” (Morgan, “Basic Problems of Evidence” (1963), pp. 265-6, quoted in *McCormick on Evidence, ibid.,* p. 140). **The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases**.

* **Only the opposing party can lead evidence of admission.**
* **Once a statement is lead, the WHOLE of the statement becomes evidence… which means the party who made the admission can then use any helpful parts.**
* **When the statement is lead as whole, there is no obligation for the jury or anybody else to accept any of it as being true.**

# *R. v. Allison* [1991] BCCA *Confessions have to be led in full, or not at all.*

**Facts:** Accused is found with a pry bar inside a cannery closed for the holidays. He is convicted for breaking and entering. He claims that he entered through an open door, and found the pry bar inside. At trial, the officer testified about the door that Accused has allegedly confessed to him as being the one through which he broke into the building. But Defence were not allowed to cross-examine on this statement. Accused appeals that it is unfair for Crown to adduce only one part of the explanation of the Accused, and then object to the cross-examination of the other.

**Issue:** Is the “whole” confession or just “part” of the confession admissible?

**Discussion:**

* **It is unfair to tender only a part of the confession**, without allowing a full examination of it.
* The statement should have been ruled inadmissible, as one made in custody to a person of authority, or a *voir dire* should have been held to determine its admissibility.
* **The “spontaneity” of the whole admission might be viewed as having more weight** than taking the stand later.
* **Leaving out part of the admission means that the accused would have to take the witness stand… this goes against the presumption of innocence and the right to not testify.**
* **Defense should have had the chance to introduce the full explanation on cross-examination**.

**Ruling:** Appeal allowed, new trial ordered.

# *R. v. Hunter* [2001] ONCA *Partially overheard confessions are admissible only if there can be no possible doubt to their meaning and context. (Context/Reasonable Doubt is everything!)*

**Facts:** Accused is alleged to have pulled out a gun during a police chase and attempted to fire it at the cops. The gun jammed and did not fire. Accused was convicted of aggravated assault, use of a firearm while attempting murder, and illegal possession of a firearm. At trial, the judge admitted an utterance **“I had a gun but I didn’t point it”** allegedly **made by Accused to his lawyer and overheard by a passerby**. The judge told to the jury that they could determine the meaning of the overheard words. Based on this, conviction was given. Accused appeals on the grounds of this error.

**Issue:** Is such a confession admissible?

**Discussion:**

* **Accused claims** that the utterance cannot meet the threshold of relevance needed for admissibility because its **meaning cannot be determined without the context**.
* It is also **so speculative that the prejudicial effect hugely outweighs the probative value**.
* In ***R. v. Farris***[1994] SCC, an **officer overheard a snippet of conversation of Accused phoning his father** and saying “…**I killed X…**”.
  + **This was found inadmissible**, because the context was unknown, thus making the meaning impossible to ascertain.
  + This makes the statement of a **low probative value**. However, the **prejudicial value is extremely high**.
* Ergo, **a P/P fail**.
* **In this case, the words uttered can be imagined in a context that would not make a confession** out of them.
* So, **the utterance is inadmissible**. As it is a **key point to the Crown case**, this is a **serious error**.
* (Let’s not also forget the fact that this statement was made to his ***lawyer*** which raises an even bigger issue of “privilege”.)

**Ruling: Full acquittal**.

# The Voluntariness Rule – a statement made to an *authority* by the accused must be proved to be voluntary… B.A.R.D.(!!)

# *R. v. Oickle* [2000] SCC *Test for voluntariness. (Firefighter accused of arson… lead to give a confession… “your fiancée with be proud of you for telling the truth.”)*

**Facts:** Appeal by the Crown from the overturning on appeal of Accused’s conviction at trial of seven counts of arson. **Accused is a firefighter** who was present at a series of fires. During investigation, Accused **agreed to submit to a polygraph** test. He was told that while the interpretation of polygraph results was inadmissible, anything he said would be admissible. The **officer conducting the test exaggerated the accuracy and reliability of the polygraph**, and **told Accused he had failed it**. During questioning over the course of six hours, police **minimized the moral significance of the crimes**, **offered Accused psychiatric help**, suggested that **confession would make him feel better**, and that his **fiancée and members of the community would respect him** for admitting his problem. **Accused confessed** to setting seven of the fires, and re-enacted the crimes. **At trial, he was convicted** of seven counts of arson. **NSCA excluded Accused’s confessions and entered an acquittal**.

**Issue: Was the interrogation convicted in a way to render the confession involuntary?**

**Discussion:**

* Two of the **biggest red flags** to the involuntariness are **fear** and **offers of favours**.
* The **most important** consideration in all cases is **to look for a quid pro quo offer** by interrogators, regardless of whether it comes in the form of a threat or a promise.
* In the **case at bar**, the questioning, **while persistent and often accusatorial, was never hostile, aggressive or intimidating, and did not hold out any implied threat or promise**.
* There was **never any insinuation of a quid pro quo**, nor did police breach Accused’s trust or improperly offer him leniency by minimizing the serious legal consequences of his crimes.
* Although **police exaggerated the accuracy of the polygraph**, merely confronting a suspect with exaggerated adverse evidence **did not, in itself, render a confession involuntary**.
* The prejudicial effect of Oickle's voluntary confession was outweighed by its **immense probative value**.
* The **confession was voluntary**.

**Ruling: Appeal allowed, conviction restored**.

# Voluntary Confession Test (*R. v. Oickle*):

1. Can the Accused on **BoP** prove that the confession made to a **person in authority**? (***Grandinetti***)
   * Generally **someone engaged in the arrest, detention, interrogation or prosecution** of an Accused.
   * **Did the Accused**, based on his or her perception of the recipient's ability to influence the investigation or prosecution, **believe that making a statement would result in favourable treatment**. (**subjective test**)
   * There is **also an objective element** to this: the **belief must be reasonable**.
2. Can the Crown on **BARD** prove there **the confession was voluntary** and the will of the Accused has **not** been overborne by **inducements, oppressive circumstances, or the lack of an operating mind**?
   * These factors are to be considered in a holistic, cumulative manner.
     1. **Threat - threatening violence or danger to the Accused or someone else** (This is **extremely** **rare** but most powerful.)
     2. **Inducements - look for *quid pro quo* offer by interrogators, explicit or implicit**. (This is the **most common form of “involuntariness**.”)

* There is a difference between proper and improper inducements: dividing line is graded.
* Any **offer of legal inducement of having lighter sentence**, which leads to a confession, **will in most cases be enough to render the confession inadmissible**.
* Offers or **psychiatric help or other counselling in exchange for a confession is a no-no**.
* **Minor inducements are OK** - as long as the Accused is mature and savvy enough (***R. v. Spencer***)
* **Spiritual or moral inducements appealing to conscience, guilt, religion, etc, are proper**.
  + 1. **Coercion/Oppression -** exposing the Accused to oppressive circumstances: **sleep deprivation, stress, isolation, denial of food, medicine, etc – including threats of same**.
       - **Lying about non-existent evidence can contribute to the coercion**.
       - **Usually not enough on its own** to show involuntariness, but it can be an addition to other factors.
    2. **Operating Mind -** conditions that **impair one’s cognitive ability to understand** what they are saying and what effect it may have in proceedings against them.
       - **Statements under shock, hypnosis, intoxication, delirium, *some* mental disorders are excluded**.
    3. **Other police trickery -** the sort of **conduct** of the authorities that , **while “neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community” and threaten the integrity of the justice system with disrepute**.
       - This is a **distinct inquiry from the others**, which are holistic.
    4. **Did that lead to the confession**?
       - The **causal relationship does not need to be precise (not “but for”), but must have had a clear influence on a balance of probabilities**.

## Polygraphs: These are inadmissible in court, but any statements of the Accused made to the cops while taking them, or talking over the results of them, can be admitted. Accused must be warned of the inadmissibility of the test results.

To see if the polygraphs have been used improperly to deceive the Accused on the admissibility of their evidence, Courts should engage in a **two-step process**:

1. The **confession should be excluded if the police deception shocks the community**.
2. Even if not rising to that level, **the use of deception is a relevant factor in the overall voluntariness analysis.**

# *R. v. Grandinetti* [2005] SCC *A person in authority is someone who Accused believes to be in a position of power to influence the prosecution or investigation.*

**Facts:** Significant circumstantial evidence linked Accused to the murder of his aunt. To obtain additional evidence against him, several officers, posing as members of a criminal organization, worked at winning the Accused’s confidence. To encourage him to talk about the murder, they suggested that they could use their corrupt police contacts to steer the murder investigation away from him. Accused eventually confessed his involvement in the murder. At no time was he aware of the true identities of the undercover officers. The trial judge ruled that the Accused’s inculpatory statements to the undercover officers were admissible, holding that the undercover officers could not be persons in authority and that no *voir dire* on voluntariness was necessary. Accused was convicted of first degree murder, and on appeal, a majority of the CA upheld the conviction.

**Issue: Are confessions to an undercover police officer pretending to be a gang member admissible, without holding a voir dire to determine their voluntariness?**

**Discussion:**

* The question of **voluntariness is not relevant unless** there is a threshold determination that the **confession was made to a "person in authority".**
* In most cases this is simple: someone engaged in the arrest, detention, interrogation or prosecution of Accused.
* The full **test of who is a "person in authority" is largely subjective**, focusing on the Accused’s perception of the person to whom he or she is making the statement.
* **The operative question is whether Accused**, based on his perception of the recipient's ability to influence the prosecution, **believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment**.
* There is **also an objective element: the reasonableness of the Accused’s belief** that he or she is speaking to a person in authority.
* It is ***not enough*, however, that an Accused reasonably believe that a person can *influence*** the course of the investigation or prosecution.
* Absent unusual circumstances, an **undercover officer is not usually viewed**, from an Accused’s perspective, **as a person in authority**.
* Where Accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged.
* In this case, the Accused failed to show that when he made the confession, he believed that the person to whom he made it was a person in authority.
* The **Accused** **believed that the undercover officers were criminals, not police officers**, albeit criminals with corrupt police contacts who could potentially influence the investigation against him.
* The statements, therefore, were **not made to a person in authority**.

**Ruling:** Appeal dismissed

# Admissions of Co-Accused

# R. v. Grewall [1999] BCCA *Confession of an Accused is not admissible against a co-Accused.*

**Facts:** An Indian style family killing. The police obtained wiretap authorizations and intercepted conversations between one of the ACs, his sister K and his girlfriend S. K said: "Dad said that he was gonna pay him so much money that if he does it and then he goes that dad planned it, you pulled the trigger and he drove the getaway car".

**Issue: Is this admissible?**

**Discussion:**

* Often co-Accused are tried together and a **problem arises when one Accused makes a confession which not only details her role, but the roles of the other co-ACs.**
* There are huge **inherent reliability concerns**, such as attempts to **shift blame to co-Accused**.
* **Where a statement is to be tendered by the Crown against one co-Accused that has the potential to be strongly prejudicial against another co-Accused, the SCC has held that the better course is to hold a separate trial of each**.
* Possible solutions: **splitting trial**, **editing** (if it won’t affect tenor of statement); **instructions** to only use for that Accused.
* **In this case**, the court chooses to admit an **edited version of the wiretap**, which **excludes any implications of the other Accused.**

**Ruling:** not admissible.

# Exclusion of Evidence Under the Charter

## *Charter of Rights and Freedoms s. 7 Life Liberty and Security of Persons*

*Everyone has the right to* ***life****,* ***liberty*** *and* ***security*** *of the person and the right* ***not to be deprived thereof******except*** *in accordance with the* ***principles of fundamental justice****.*

## *Charter of Rights and Freedoms s. 8 Search and Seizure*

*Everyone has the right to be secure against unreasonable search or seizure.*

**Where a person has an expectation of privacy, the police can only access his property for investigative purposes when there is a reasonable cause**.

## *Charter of Rights and Freedoms s. 10 Arrest or Detention*

*Everyone has the right on arrest or detention*

*(a) to be informed promptly of the reasons therefore*

*(b) to retain and instruct counsel without delay and to be informed of that right;*

## *Charter of Rights and Freedoms 13 Self Incrimination*

*A witness who testifies in any proceedings has the* ***right not to have any incriminating evidence*** *so given* ***used to incriminate*** *that witness in any other proceedings,* ***except*** *in a prosecution for* ***perjury*** *or for the giving of* ***contradictory evidence****.*

## *Charter of Rights and Freedoms 24 Exclusion of Evidence bringing administration of justice into disrepute*

*(2)Where, in proceedings under subsection (1), a court concludes that* ***evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter****, the* ***evidence shall be excluded if it is established that****, having regard to all the circumstances, the admission of it in the proceedings* ***would bring the administration of justice into disrepute****.*

# *R. v. Grant* [2009] SCC *A new test for exclusion of evidence consistent with the express purpose of s.24(2)*

**Facts: Accused** was stopped by undercover police for **looking suspicious**. Upon being questioned by them, he was **fidgeting with his pants**, and when **asked by the police if he has something that he should not** have, **he confessed** to possession of a bag of pot and a loaded gun. He was then searched, the items seized, and he was charged for trafficking, possession of an illegal firearm, and a whole bunch more.

**Issue: Is the evidence admissible?**

**Discussion:**

* The general rule of inadmissibility of all non-discoverable conscriptive evidence seems to go against the requirement of s. 24(2) that the court determining admissibility must consider “all the circumstances”.
* Trial fairness as a multifaceted and contextual concept is hard to reconcile with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances.
* The **words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice**.
* But s. 24(2) does not focus on reaction to the individual case. Rather, **it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence**.
* The new test of **the admission of evidence obtained in breach of the Charter should engages three avenues of inquiry**, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective.
* See test below.
* The three lines of inquiry described above support the **presumptive general, although not automatic, exclusion of statements obtained in breach of the Charter**.
* In the case at bar:
  + **Accused was in detention, and he should have been provided with his rights**. This is a **breach of s.10(b)** and the **statement by Accused of his guilt should have been inadmissible** by the old rules. This would have made the **discovery of the evidence of pot and the gun also inadmissible**.
  + However, **officers acted in a good faith**, and they **made a reasonable mistake as to whether Accused was in detention**.
  + The impact of **the Charter breach on the Accused’s protected interests was significant**, although not at the most serious end of the scale. The fact that the evidence was non-discoverable otherwise aggravates the impact of the breach on Mr. Grant’s interest in being able to make an informed choice to talk to the police.
  + But the **value of the evidence is considerable**.
  + **These effects must be balanced** in determining whether admitting the gun would put the administration of justice into disrepute.
  + The **significant impact of the breach of Charter rights weighs strongly in favour of excluding** the gun, while the **public interest in the adjudication of the case on its merits weighs strongly in favour of its admission**.
  + **Under the new test, the evidence is admissible.**

**Ruling:** Appeal allowed in part.

# New Test for Excluding Evidence Under s.24(2): per *R. v. Grant* [2009] SCC

When faced with an application for exclusion under s. 24(2), the question is always whether the admission of evidence will bring the administrative justice into disrepute.

The **three lines of inquiry** to pursue are:

1. The **seriousness of the Charter-infringing state conduct**
   * The concern here is not to punish the police or to deter breaches. The main concern is to preserve public confidence in the rule of law and its processes.
   * **More serious**: willful or flagrant disregard for Charter; casual approach to Charter.
   * **Less serious**: good faith on the part of the police, extenuating circumstance of urgency
2. The **impact of the breach** on the Charter-protected interests of Accused
   * Certain Charter rights have more impact on the Accused than others.
   * Look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. So **a s.8 violation of a house is more serious than s.8 violation in a bus station locker**.
   * **Rights relating to self-incrimination are very serious** in this section.
3. **Society’s interest** in the adjudication of the case on its merits.
   * Will the vindication of the Charter violation through the exclusion of evidence **extracts too great a toll on the truth-seeking goal of the criminal trial?**
   * Should **consider not only the negative impact of admission but also the impact of failing to admit**.
   * Mere reliability of evidence and concern for truth finding will often clash with the principles of s.24(2) which call for a consideration of all circumstances.
   * The **admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute** where it forms the entirety of the case against the Accused.
   * Conversely, the **exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution**.
   * The **weighing process and balancing of these concerns is one for the trial judge**. As a general rule, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the Accused’s protected interests, the trial judge may conclude that it should be admitted under s. 24(2).
   * The judge **should refuse to admit evidence where there is reason to believe the police deliberately abused their power** to obtain a statement which might lead them to such evidence.

## Applicability of the new test to various types of evidence:

1. **Statements by the Accused**
   * First consideration: **a statement made to an authority is presumed inadmissible unless the Crown can establish beyond a reasonable doubt that it was made voluntarily**. After this, s.24(2) can be considered.
   * Statements by the Accused engage the principle against self incrimination, which is fundamental to Charter.
   * Because of this, there is a heavy presumption of inadmissibility to statements by Accused, but it is rebuttable.
   * The **concern with proper police conduct in obtaining statements from suspects** and the centrality of the protected interests affected **will in most cases** **favour exclusion of statements taken in breach of the Charter**.
   * When it comes to society’s interest, consideration of reliability of the evidence may add to weight of presumption. Corroborative evidence could potentially make it more reliable?
2. **Bodily Evidence**
   * There is a range of bodily evidence ranked on how invasive it is: from breath and fingerprints, to cavity searches and DNA samples.
   * The first two inquiries will be important here. What was the police conduct? What was the level of intrusion?
   * Did it substantially violate bodily integrity?
   * The public interest inquiry will usually favour admission of bodily evidence.
3. **Non-bodily Physical (Real) Evidence**
   * Privacy is the right most commonly engaged in this area, so the degree of violation/expectation of privacy is key. Bodily integrity may also be a consideration.
   * Reliability issues with physical evidence will not generally be related to the Charter breach. Therefore, this consideration tends to weigh in favour of admission.
4. **Derivative Evidence**
   * Physical evidence discovered as a result of an unlawfully obtained statement.
   * The starting place is certain presumption of inadmissibility.
   * Discoverability retains a useful role in assessing the actual impact of the breach on the protected interests of the Accused. Objects undiscoverable without the statement are likely to be inadmissible. Objects that can be discovered, opens room for analysis.
   * The public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence, as it is usually physical and reliable.

# Privilege Evidence which is probative and reliable can still be inadmissible if it violates the principles of social relationships.

## Privilege Against Self-Incrimination

* Traditionally **s.7 of Charter includes** that Accused in state custody is not obliged to talk to the police (**right to silence**)
* Under ***R. v. Hebert****,* the right to silence for Accused under custody was read into s.7 of the Charter.
* This was in relation to an undercover cop who elicited a confession in jail after Accused refused to talk to the police during interrogation.

# R. v. Singh [2007] SCC *The right to silence issues in custody will now be covered by the broad concept of voluntariness: a finding of voluntariness will be determinative of the s.7 right to silence issue. (This was a 5-4 split decision of the Court)*

**Facts:** Appeal by Accused from his conviction for second degree murder on the basis his **s.7 right to silence was breached**. The Accused was arrested with respect to a shooting death of an innocent bystander killed by a stray bullet. Accused was advised of his s. 10 (b) right and consulted counsel privately. During two subsequent interviews with police **Accused stated 18 times that he did not want to discuss the incident**. Eventually, police got him to an interview. While Accused did not confess to the crime, he made numerous self-incriminatory admissions on the issue of identification at trial. On a *voir dire*, the trial judge determined the admissions, in all the circumstances, were not the result of the police systematically breaking down his operating mind and the Accused’s right to silence was not undermined. The trial judge held the probative value of the statements outweighed their prejudicial effect and ruled them admissible. BCCA upheld the trial judge's ruling.

**Issue: Are the self-incriminatory statements that the police got out of Accused in the breach of his s.7 right to silence?**

**Discussion:**

* The old common law right to silence is that no one is obliged to provide info to police during questioning.
* This has been enshrined in s.7 of the Charter as a fundamental principle of the right to remain silent.
* What is the **overlap between the voluntary confession rule in common law (*Oickle*) and the s.7 right to silence?**
* The two test overlap, but the common law one has more weight, as it places the **onus on the Crown to prove BARD that the confession was *voluntary***, as opposed to the onus on Accused to prove s.7 infraction, followed by a s. 24(2) exclusion.
* But **s.7 does apply to undercover police when accused is in police custody, (jail cell undercover cop), where voluntariness rule has no power**.
* The Charter gives the minimum rights to everyone. The **confession rule expands and enhances the s.7 right.**
* The right to silence issues in custody will now be covered by the broad concept of voluntariness: **a finding of voluntariness will be determinative of the s.7 right to silence issue.**
* The exercise of the **right to silence is not a straight up Charter right, as the right to counsel (s.10(b)), which is** provided for expressly.
* The **right to silence is within control of the Accused**, whereas s.10(b) is something out of the control of Accused, and is in the Charter to protect the Accused from police.
* Charter is a **balance of interest between individual and society.**
* **Making the right to silence absolute would abolish the right of society to prosecute criminals. S.7 as it is, with a limited right to silence, is a balance of the two interests**.
* Thus, the right to silence in s.7 is a limited right
* There is nothing that stops the police from questioning the subject after s.10(b) right has been exercised
* Police persuasion, **short of denying Accused the right to chose**, or depriving him of an operating mind, **does not breach the right to silence**.
* So, **use of legitimate means of persuasion is permitted** under the rule.
* It is **not appropriate to require that police refrain from questioning a detainee who states that they do not wish to speak to police**.
* There was **no error in law**. The police were right in questioning Accused. The **statements made by him are admissible**.

**Ruling:** Appeal dismissed

# *R. v. Turcotte* [2005] SCC *Silence in the face of police questioning is a Charter right and cannot be used as evidence of guilt. (Common law right of silence out of custody)*

**Facts:** Appeal by the Crown from a judgment of BCCA, setting aside Accused’s murder convictions, and ordering a new trial. **Accused went to a police station and asked that a car be dispatched to his ranch, but refused to explain why**. The officers dispatched to the ranch discovered three victims who had died from axe wounds to the head. Accused was charged with three counts of second degree murder. The evidence against him was entirely circumstantial. The trial judge informed the jury that Accused’s refusal to respond to certain questions from the police was post-offence conduct from which an inference of guilt could be drawn. The jury convicted Accused on all three counts, but the BCCA set aside the convictions and ordered a new trial.

**Issue: Can Accused’s refusal to talk to the cops be seen as evidence of guilt?**

**Discussion:**

* **Everyone has the right to silence in the face of police questioning**, even if he or she is not detained or arrested.
* This right existed at all times against the state, whether or not the person asserting it was within the state's power or control.
* Moreover**, a voluntary interaction with the police did not constitute a waiver of this right**. Hence, Accused did not waive his right to silence by going to the police station and answering some of their questions.
* Post-offence conduct is only those actions of the Accused that are probative of guilt.
* **Silence in the face of police questioning would rarely be admissible as evidence of post-offence conduct because it was rarely probative of guilt**.
* **Evidence of silence (or lack of) can be admitted sometimes: when it goes to narrative**. (i.e. defence seeks to emphasize Accused’s cooperation with police, when it is relevant to a defence theory of mistaken identity, or to infer credibility when there are two co-Accused blaming each other, and one has been more talkative prior to trial.
* **When evidence of silence is admitted**, the **jury must be carefully instructed on the very limited use** for which such evidence could be used.
* So, the **evidence regarding Accused’s silence was not admissible as post-offence conduct**.

**Ruling:** Crown Appeal dismissed. (New trial ordered)

# Self-incriminating statements at previous trials

## *Charter of Rights and Freedoms – s.13 Self-Incrimination*

*A witness who testifies in any proceedings has* ***the right not to have any incriminating evidence*** *so given* ***used to incriminate that witness*****{Does not include credibility issues}** *in any other proceedings,* ***except*** *in a prosecution for* ***perjury*** *or for the* ***giving of contradictory evidence****.*

## *Canada Evidence Act – s. 5 Incriminating Questions*

*(1)* ***No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him****,* ***or*** *may tend to* ***establish his liability to a civil proceeding*** *at the instance of the Crown or of any person.*

*(2)* ***Where with respect to any question a witness objects to answer*** *on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then* ***although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him*** *thereafter taking place,* ***other than*** *a prosecution for* ***perjury*** *in the giving of that evidence or for the* ***giving of contradictory evidence****.*

# Four kinds of immunity that can be derived from the right to silence – (only 3 apply in Canada).

1. **Use immunity**: compelled incriminating testimony **cannot be used directly against the Witness**.
2. **Derivative use immunity**: **evidence undiscoverable but for the compelled incriminating evidence cannot be used against the Witness**.
3. **Constitutional exemption**: a form or **complete immunity from testifying where proceedings are undertaken or predominantly used to obtain evidence for the prosecution of the Witness**.
4. **Transactional immunity**: W cannot be charged on the offence of the same subject matter as the compelled incriminating testimony. **This is not applicable in Canada**.

**2**

# *R. v. Henry* [2005] SCC *Accused who gave voluntary testimony at his previous trial is not covered by s.13 (this is a very important case)*

**Facts:** Henry and Riley were involved at a drug-jacking where they raided a grow op and killed the guard by taping shut his mouth and nose. **At trial both pled intoxication**, and claim that their **memory is very hazy**. They are **convicted, but get an appeal from CA**. At **second trial**, **Riley** admits lying at the first trial, **recovers his memory**, and admits to putting tape on the guard, however, **places most of the blame on Henry**. **Henry has even less memory** – **sticks with being super intoxicated** – and says that **with time his memory has gotten worse**. At the second trial, the Crown cross-examined ACs on testimony given by them at the first trial that was inconsistent with their testimony during the retrial. ACs were again convicted of first degree murder. **On appeal Accused argued that their prior incriminating testimony could not be used against them in the retrial under s.13**. The CA upheld the conviction.

**Issue: Can prior voluntary testimony by Accused be excluded under s.13? (Did it breach *Noel*? Riley’s testimony was actually better at the first trial so does it “incriminate”?)**

* **SCC decides to create a new framework for s.13 (Principled Approach)**

**Discussion:**

* Under ***R v. Kuldip***the rule was that **inconsistent testimony** from prior proceedings **can be used against credibility**.
* Under ***R. v. Noel*****changed the rule** so that **only absolutely innocuous (not incriminating/no inference of guilt in any way)** statements prior proceedings can be **used against credibility**.
* **This meant that Crown was impotent** on cross-examination of the useful and signficant inconsistent statements.
* Per ***Noel***, **Accused would have been saved under s.13 from having previous incriminating statements brought in.**
* **SCC decides to create a new framework for s.13**
* The **purpose of s.13 was to protect individuals from being compelled to incriminate themselves**, as a part of a *quid pro quo* deal between state and individual to induce them to testify as a witness.
* s. 13 is meant to protect Witnesses who then become the Accused.
* The new rule should be that **anyone compelled to give testimony should be protected by s.13 and cannot be used, even against credibility** (***Kuldip***is overruled)

{Nikos thinks we should call it a strong presumption, and that there should be exceptional circumstances of wildly contradictory testimony for bringing that witness' testimony into a second trial, for credibility.}

* **All witness testimony is presumed to be compelled**…
* **…**except where the Accused is the witness… because **Accused can never be compelled to testify**.
* But Accused’s at previous trial can be either compelled or voluntary.
* **s.13 of the Charter is not available to Accused, who gave voluntary testimony at their first trial on the same indictment.**
* **Accused freely testified at both trials with no compulsion to do so**.
* Their **s.13 Charter rights were not violated**.
* The **Crown could not file previous testimony** at the retrial **unless the Accused choses to testify again**, because to do so would permit the Crown indirectly to compel the Accused to testify.

**Ruling:** Appeal dismissed

• Accused who gave testimony as a witness at a previous trial is covered by s.13

• Accused who gave compelled testimony at his previous trial is strongly covered by s.13 and s.5(2)

• Accused who gave voluntary testimony at his previous trial on the same indictment is not covered by s.13

**Section 13 – Compelled Testimony cannot be used against you… what about other circumstances where information is compelled?**

# Re: Application under s.83.28 of the Criminal Code [2004] SCC - *Investigative hearings (terrorist, securities/exchange, MVA, etc.) can push the limits of s.7 rights.*

**Facts: S.83.28 of the Criminal Code is** one of the new provisions added to the Code as a result of the enactment of the Anti-terrorism Act in 2001. It provides for **a process of an “investigative hearing” judicial tribunal, where a Named Person is brought before a judge and is obliged to give evidence to the tribunal**.

**Issue: Is s.83.28 in violation of the right to silence and principle against self-incrimination?**

**Discussion:**

* If the state has **reasonable grounds** to believe you know about a terrorist offence that has or is about to happen you **can be required to come and tell the police what you know and turn over any material** you have.
* This does engage the s.7 right to remain silent.
* This is a **statutory exception to the common law rule of silence**.
* Because the statements are statutorily compelled testimony, they **cannot be used to incriminate the testator.**
* Witness **gets direct use, derivative use, and constitutional exception immunity under s.83.28.**
* If the witness believes they are the actual target of the investigation they can apply for a Constitutional exemption on the basis that they have a s.7 right to remain silent.
* The policy is compliant with the Charter, because it cannot be used against the Witness.
* **If Crown can prove derivative evidence to be otherwise discoverable, then it can be admitted against W**.

**Ruling:** Not unconstitutional.

# Four kinds of immunity that can be derived from the right to silence – (only 3 apply in Canada).

1. **Use immunity**: compelled incriminating testimony **cannot be used directly against the Witness**.
2. **Derivative use immunity**: **under s.83.28 all** **evidence (discoverable or undiscoverable) cannot be used against the Witness**. (even including immigration and extradition hearings)
3. **Constitutional exemption**: a form or **complete immunity from testifying where proceedings are undertaken or predominantly used to obtain evidence for the prosecution of the Witness**.
4. **Transactional immunity**: W cannot be charged on the offence of the same subject matter as the compelled incriminating testimony. **This is not applicable in Canada**.

# Other Societal Values which deserve immunity/confidentiality (Privilege)

* Limits to disclosure of the evidence itself.
* Limits to compelled testimony by the parties involved (the lawyer, doctor, journalist, etc.)

**Privilege is either class (absolute) or case by case (balancing test).**

# *R. v. National Post* 2010 SCC 16 – *is journalistic (secret source) privilege class or case-by-case? It is case-by-case.*

**Background and Facts**

R. v. National Post, [2010 SCC 16](http://csc.lexum.umontreal.ca/en/2010/2010scc16/2010scc16.html) is a case stemming directly from the “Shawinigate” scandal involving former Canadian Prime Minister Jean Chrétien. According to a [timeline](http://news.nationalpost.com/2010/05/07/the-shawinigate-affair-a-timeline/) provided by the National Post, the genesis of “Shawinigate” was the sale of a golf course and adjacent hotel by the former PM and his business partners to a Mr. Duhaime. The sale occurred in 1993—later that year, Chrétien was elected Prime Minister. Mr. Duhaime, wishing to expand the hotel, was initially rejected for a related loan from the Business Development Bank of Canada (BDBC). However, on his second application to BDBC he received a loan for $615,000.

In 2001 the **National Post obtained related documents from a secret source purporting to contain evidence of a debt owed by Mr. Duhaime to a Chrétien family holding company. The former PM claimed the documents were forged and his lawyer claimed that Mr. Beaudoin was the source.**

**Under a promise of confidentiality a “secret source”,** appropriately **referred to as Mr. X,** and through an intermediary, Mr. Y**, provided McIntosh with the documents implicating Chrétien.** To assess the authenticity of the documents **McIntosh forwarded them to the Prime Minister’s Office, the PM’s legal counsel, and the BDBC. All claimed the documents were a forgery** and a complaint was made to the RCMP**.**

After the National Post denied a request from the RCMP to hand over the documents the **police obtained a warrant and assistance order** from the Ontario Court of Justice for the National Post **to produce the documents**. The National Post made a successful application to the same court to quash the orders (R. v. National Post (2004), [69 O.R. (3d) 427](http://www.canlii.org/en/on/onsc/doc/2004/2004canlii8048/2004canlii8048.html)). The Ontario Court of Appeal overturned that decision (R. v. The National Post (2008), [89 O.R. (3d) 1](http://www.canlii.org/en/on/onca/doc/2008/2008onca139/2008onca139.html)) and the National Post was granted leave to appeal by the SCC.

**Issues**

1. Does a journalist-source confidentiality privilege exist under s. 2(b) of the Charter?
2. Is there a common law journalist-source confidentiality privilege?
3. If question 2 is answered in the affirmative, should a journalist-source confidentiality privilege be applied on a class or case-by-case basis?
4. Does the media merit special consideration under s. 8 of the Charter?

**Discussion**

* **Section. 2(b) of the Charter Does not Guarantee Journalist-Source Confidentiality**
* The appellants and interveners argued that s. 2(b) of Charter affords journalists a “constitutional immunity against compelled disclosure of secret sources.”
* **The appellants and interveners proposed** the following broad three-part test**: if (1) a journalist, has (2) engaged in news gathering, and (3) “has acquired information under a promise of confidentiality” she should enjoy immunity**, unless an exception can be established under s. 1 of the Charter.
* The **Court rejected this civil libertarian ideal**.
* Finding in favour of constitutional immunity would establish Canada as one of the first common law jurisdictions to do so.
* Similar privileges, such as solicitor-client privilege, have not been afforded constitutional protection. The SCC relied on precedent (R. v. McLure, [2001 SCC 14](http://scc.lexum.umontreal.ca/en/2001/2001scc14/2001scc14.html)) that it interpreted as establishing **solicitor-client privilege as a “fundamental and substantive rule of law” but not constitutionally engrained**.
  1. ***“[t]o throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever “sources” they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it…would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.”***
* **The Journalist-Source Confidentiality Privilege is to be Determined on a Case-by-Case Basis**
* The **class privilege was rejected for the following reasons**:
  1. a **lack of precedent** in both Canadian and foreign jurisdictions
  2. journalists are **not regulated professionals such as lawyers or the police**;
  3. it would **be difficult to measure the scope and particulars of such a privilege considering the variable nature of the journalism profession**.
* The correct approach is the **Wigmore** criteria set out by John Henry Wigmore (outlined below), along with reference to respective common law applications.
* For instance, the case of  **R. v. Gruenke**, [[1991] 3 S.C.R. 263](http://www.canlii.org/en/ca/scc/doc/1991/1991canlii40/1991canlii40.html) held that confidentiality surrounding “**religious communications” was to be determined on a case-by-case basis**.
* **Journalist-source confidentiality exists**, according to the **Wigmore** criteria, **if ALL the following factors are met:**
  1. The communication **originates in a confidence** that the identity of the informant will not be disclosed…;
  2. The **confidence must be essential to the relationship** in which the communication arises…;
  3. The **relationship must be one which should be “sedulously fostered” in the public good**…; and
  4. In the instant case, the **public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth**.
* The onus was on the National Post to satisfy all of the aforementioned criteria. **The first three conditions were satisfied in this case—the fourth was not.**
* One and two exist.
* **Determining** whether the journalist-source relationship is one that should be “**sedulously fostered in the public good**” provides the opportunity to gauge the professionalism or seriousness of the relationship. For instance, **the relationship between the small-time blogger and a confidential source “might be weighed differently” than the relationship in this case**.
* Despite the satisfaction of the first three Wigmore criteria, the **failure to meet condition 4 represented the turning point in the decision and indicated that journalist-source confidentiality is afforded questionable protection under the law**.
* **When making a determination under criterion 4 “the nature and seriousness of the offense under investigation, and the probative value of the evidence sought to be obtained…[are] measured against respecting the journalist’s promise of confidentiality.”** As well, **“the underlying purpose of the investigation” is relevant** at this stage.
* **The protection of confidential sources “is closely aligned with the role of ‘the freedom of the press…’”**
* Furthermore, the **“democratic deficit in the transparency and accountability of our public institutions”** and the important role journalism plays in providing some level of transparency **is acknowledged**.
* **However**, it is ruled that **“the “leak” of a forged document undermines rather than advances achievement of the purpose of the privilege claimed by the media in the public interest.”**
* **The competing interest to press freedom is the public interest in getting to the truth of the alleged forgery.** This was held to outweigh the former.
* Thus, “[t]he bottom line is that **no journalist can give a source a total assurance of confidentiality**.”

# Solicitor Client Privilege

* **Not all information and conversation** between a lawyer and client **are covered** by this.
* Statements must be **made in confidence**. (may not apply in social situations)
* Statements must be **related to “legal advice**.” (business and personal advice may not be covered)
* **Future criminal activity is excluded**.
* Putting witnesses upon stand - any evidence led along these lines can be cross-examined.

# *R. v. Shirose* [1999] SCC *Exceptions to solicitor client privilege (Undercover RCMP are going to sell heroin and get advice from lawyer beforehand) –* RCMP waived privilege by asserting reliance upon consultation with the lawyer*.*

**Facts:** Accused is a victim of a reverse sting operation by the **police**, who **sold a large shipment of heroin** to him. The legality of this operation is unclear. Prior to the set-up, **RCMP consulted with a lawyer** from DoJ. When asked to **reveal the nature of the advice that they received**, they relied on solicitor-client privilege to evade disclosure.

**Issue: Does solicitor-client privilege apply** in this case? (**Yes**)

**Does it fall under the future crime exceptions?** (**No**)

**Was privilege waived**? (**Yes**)

**Discussion:**

* Wigmore’s definition is: **where legal advise of any sort is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence of the client, are at his instance permanently protected from disclosure by himself or by his legal adviser, except where the protection is waived.**
* The **RCMP's consultation with the DoJ was privileged** solicitor-client communication.
* But are there any applicable exceptions that would have waived the right?
* **Future Crimes and Fraud Exception:**
  + **Where a client seeks communication to facilitate the commission of a crime, the communication is not privileged.**
  + **But that is not the case here – the RCMP were simply getting legal advice – is this a crime or isn’t it?**
  + The client must either conspire with the adviser or deceive him.
  + The privilege is denied only where the client knows that the activity is a crime.
* **Explicit Waived Privilege**
  + Where a client explicitly waives the privilege because **they** **want to lead some piece of evidence**.
* **Implicit Waived Privilege (Full Answer and Defence) Exception**:
  + The RCMP **waived privilege by putting its good faith belief in the legality of the reverse sting in issue and by asserting reliance upon consultation with the DoJ to support its position**.
* **In the end, disclosure was to made to the Accused prior to re-trial regarding the legal advice given** **respecting the legality** of RCMP officers posing as drug sellers and offering drugs for sale to suspected distributors, **and the possible consequences to officers** engaging in these activities.

**Ruling:** Appeal allowed

# *R. v. Brown* [2002] SCC *Solicitor Client Privilege and the Right to make full answer and defense. - Accused charged with murder – Third party allegedly confessing to murder to his lawyers – Accused seeking production of lawyers’ files (Innocence At Stake Exception)*

**Facts:** About three weeks after a man who had been found stabbed in the chest died in hospital, **R told the police that her then boyfriend, the appellant, had told her that he was the person who had killed the deceased; she said that he had also told her that he had confessed to his lawyers**.  **The police investigated** the appellant in relation to the homicide for a number of months.  The **appellant denied killing the deceased**.  The **appellant was never charged** with respect to the murder and the **investigation against him was dropped**.

**The accused** was **seen looking for the deceased** on the morning the deceased was killed.  A videotape showed the **accused entering his own apartment building, located one block from the crime scene, less than an hour after the deceased had been found stabbed**.  Under warrant, the police seized from the accused’s apartment **a napkin with the deceased’s pager number on it**.  The accused was **charged with the deceased’s murder** shortly after a jailhouse informant reported that he had overheard a conversation between the accused and a third inmate.  The **accused** brought a ***McClure*** **application for an order compelling production of the files, documents and notes, if any, relating to communications between the appellant and his lawyers concerning the appellant’s involvement in the deceased’s death**.  The motions judge found that the accused had satisfied both the threshold question and the innocence at stake test of the ***McClure*** application.  He ordered production of one document and portions of other documents.

**Discussion:**

* **Solicitor/Client Privilege is one of the highest forms of protection** – and **includes some Constitutional protection.**
* The ***McClure*** **test for infringing solicitor-client privilege is stringent, and will only be satisfied in rare circumstances**.
* The two interests at stake (**absolute privilege** **versus** **innocence at stake** via full answer and defense) are both fundamental to Canadian justice.
* **Innocence at stake and the right to make full answer is a little more important**.
* ***R. v. McClure*****sets out the test** for disclosure exception to the solicitor client privilege.
* This is to be done very rarely, and only after a stringent test.
* It should **only happen when** the issues going to the guilt of Accused are involved, and there is a genuine **risk of wrongful conviction**.
* If the judge allows an exception, there must be protections…
  + Information released to Judge first.
  + Carefully limited use of the information.
  + No disclosure beyond this case.
  + The **person whose privilege was broken gets direct and derivative use immunity, but does not get transactional immunity**.
* In this case the ***McClure*** test is **not met**.

**Ruling:** Appeal allowed (Solicitor-Client Privilege upheld).

## *R. v. McClure* Test:

1. Accused must establish that **the information that he seeks from the solicitor client communication is not available from *any* other source** AND that he is ***otherwise* *unable* to raise a Reasonable Doubt**. {ONLY OPTION}
2. Accused has to demonstrate an **evidentiary basis that a communication exists** that could raise a Reasonable Doubt.
3. **Judge** has to **examine the communication in private**, see if it is likely to raise a Reasonable Doubt.